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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 933

SHERMAN A. RICKER

vs.

NATHAN POWELL ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 13, 1879.

# SUPREME COURT OF THE UNITED STATES.

APPEAL FROM CIRCUIT COURT, UNITED STATES, NORTHERN DISTRICT OF ILLINOIS.

SHERMAN A. RICKER
*v.*
NATHAN POWELL ET AL.
} IN CHANCERY.

*No.*.....

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Pleas in the Circuit Court of the United States, for the Northern District of Illinois, held at the United States court rooms, in the city of Chicago, in the district aforesaid, before the judges thereof, on Monday, the seventh day of July, in the year of our Lord one thousand eight hundred and seventy-nine, and of our independence the one hundred and fourth.

WILLIAM H. BRADLEY,
*Clerk.*

SHERMAN A. RICKER
*v.*
NATHAN POWELL, ELIAS GREENEBAUM, HENRY H. Walker, Samuel J. Walker, R. E. Jenkins, assignee in bankruptcy of Samuel J. Walker, Louisa M. Tillinghast, William F. Coolbaugh, Heman G. Powers, Emerson G. Orvis, Gerhard Foreman, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, Addie R. Coolbaugh, Sarah E. Powers, Wirt Dexter, John Brannock, Patrick Brannock, Julius Rosenthal, Mary E. Orvis, John Somes, William P. Frailey, William Flannagan, Flannagan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, The Northwestern Fertilizing Company, The Third National Bank of St. Louis, James Q. Minshall, John P. Squire. } In Chancery.

NORTHERN DISTRICT OF ILLINOIS, *set.*

Be it remembered that on the 21st day of May, A. D. 1879, came Sherman A. Ricker, by Melville W. Fuller, his solicitor, and filed in the office of the clerk of the Circuit Court of the United States, for the Northern District of Illinois, at Chicago, in the district aforesaid, his bond for costs, and at the same time filed his petition in said entitled cause, which said petition is in the words and figures following, to wit:

*Bond for Costs.*

UNITED STATES OF AMERICA. } ss.
*Northern District of Illinois.* }

Circuit Court, May Term, A. D. 1879.

SHERMAN A. RICKER
*v.*
NATHAN POWELL AND OTHERS. } Bill of Review. In Chancery.

I hereby enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by

the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 21st day of May, A. D. 1879.

M. W. FULLER.

(Endorsed:)
Filed May 21, A. D. 1879.
WM. H. BRADLEY, *Cl'k.*

*Petition of Sherman A. Ricker.*

In Circuit Court of the United States, in and for the Northern District of Illinois.

NATHAN POWELL
*v.*
SAMUEL J. WALKER ET AL. } In Chancery.

*To the Honorable the Judges of said Court in Chancery sitting:*

Your petitioner, S. A. Ricker, respectfully shows that he is one of the defendants in the above entitled cause, and that heretofore, to-wit: on the 3d day of March, A. D. 1879, he filed herein his certain petition and affidavits, asking therein for leave to file a Bill of Review in said cause; that at that time the original decree in said cause had been reinstated with a modification, under the mandate of the Supreme Court of the United States; that this mandate was recalled while your petitioner's application was pending, and said cause thereby returned to the Supreme Court, where it had been theretofore pending on appeal; that on or about May 15th, 1879, the mandate of the Supreme Court has again come down to this Court, and the order of this Court has been herein entered, directing the Master in Chancery to proceed with the sale directed by said original decree.

Your petitioner further shows unto your Honor, that he has discovered since March 3d, 1879, that at the time block 16 was conveyed to said Kinney, he, said Kinney, was informed that said block had been theretofore conveyed to Messrs. Coolbaugh and Powers; and said S. J. Walker agreed with said Kinney to procure of said Coolbaugh and Powers their conveyance of the same; which he did, but not until February, 1874.

And further, that when said S. J. Walker obtained said Kinney notes and trust deed to Rogers, it was upon the understanding and agreement with Kinney that they were to be applied to the payment of the Powell mortgage; and when said Walker parted with said notes and trust deed to Greenebaum and Foreman, said Greenebaum and Foreman were well aware that said Walker had taken and held the same to apply in payment of the Powell mortgage.

Your petitioner further shows unto your Honors, that said S. J. Walker was wholly insolvent at the time said Kinney notes and trust deed were transferred to said Greenebaum and Foreman, to the knowledge of said Greenebaum and Foreman at the time they took the same.

Your petitioner therefore renews his application aforesaid (having re-drawn his proposed bill of review), upon the petition and affidavits filed herein March 3d, 1879, and the papers therein referred to, and which he prays may be taken as part hereof, and upon this petition and the affidavit of Samuel J. Walker this day filed herein, and submits herewith the bill of review, which he prays he may be permitted to file.

Your petitioner therefore prays that he may be at liberty to file said bill of review, for the purpose of having said decree reviewed, reversed, and set aside or modified, as prayed in said bill of review, and that no further proceedings may be had under the same until so modified.

Your petitioner further says, that the property described in said bill of review and in the original bill herein, is about to be advertised for sale, and your petitioner therefore prays for an order staying said sale until the determination of this application.

Your petitioner further shows, that the property covered by said Powell mortgage is worth at least two hundred thousand dollars, and is ample security for the amount decreed, or which may be decreed as due upon the complainant's mortgage.

S. A. RICKER.

STATE OF ILLINOIS, } ss.
Cook County. }

Personally comes Sherman A. Ricker, and being duly sworn, on oath declares and says that he signed the foregoing petition; that he has heard the same read and knows its contents, and that the same is true to the best of his knowledge, information and belief.

S. A. RICKER.

Subscribed and sworn to before me, this 21st day of May, A. D. 1879. [SEAL.] JOHN MORRIS, *Notary Public.*

(Endorsed):
Filed May 21, 1879.
WM. H. BRADLEY, *Cl'k.*

Afterwards, to wit: On the 7th day of July, A. D. 1879, in the July term of said court, in the record of the proceedings thereof, in said entitled cause, before the Hon. Henry W. Blodgett, District Judge, is the following entry, to wit:

SHERMAN A. RICKER
*v.*
NATHAN POWELL, ELIAS GREENEBAUM, HENRY H. Walker, Samuel J. Walker, R. E. Jenkins, assignee in Bankruptcy of Samuel J. Walker, Louisa M. Tillinghast, William F. Coolbaugh, Heman G. Powers, Emerson G. Orvis, Gerhard Foreman, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, Addie R. Coolbaugh, Sarah E. Powers, Wirt Dexter, John Brennock, Patrick Brennock, Julius Rosenthal, Mary E. Orvis, John Somes, William P. Frailey, William Flannagan, ——— Flannagan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, The Northwestern Fertilizing Company, The Third National Bank of St. Louis, James Q. Minshall, John P. Squire.

In Chancery.
Bill of Review.

Sherman A. Ricker having appeared in Court by his solicitor, Melville W. Fuller, and presented a petition asking leave to file a Bill of Review, to review the record of the proceedings and decree in the case of Nathan Powell against Henry H. Walker and others, in chancery in this Court, and it appearing to the Court that notice of the application has been served upon Nathan Powell, Elias Greenebaum, Gerhard Foreman, John Brennock, Patrick Brennock, Julius Rosenthal, Levi Abt, The International Bank, The Northwestern Fertilizing Company, Charles S. Symmes, and Daniel Pratt, assignees in bankruptcy of the People's Safe Deposit and Savings Institution of the State of New York, Samuel J. Walker, H. H. Walker, H. G. Powers, and Nathan Powell, Elias Greenebaum and Gerhard Foreman having appeared by their solicitors, Junius Mulvey, Edward S. Isham and A. M. Pence, and opposed the granting of the prayer of said petition, and the Court having heard the petition, together with the bill of review proposed to be filed, the records in the case sought to be reviewed, and the affidavits read, and having heard the arguments of counsel, and being sufficiently advised in the premises, it is ordered and decreed by the Court that the prayer of the petition be denied, and the petition dismissed at the costs of Sherman A. Ricker the petitioner. And it is further ordered that the said Nathan Powell, Elias Greenebaum and Gerhard Foreman, recover of said Sherman A. Ricker their costs taxed at the sum of thirteen dollars and thirty-five cents in this behalf expended, and that execution issue therefor.

And thereupon the said Sherman A. Ricker prayed an appeal to the Supreme Court of the United States, which is allowed by the Court, and the penalty in the bond for a supersedeas is fixed at one thousand dollars. And on the same day, to-wit, the 7th day of July, A. D. 1879, a certificate of evidence was filed in said clerk's

office in said entitled cause, which said certificate is in the words and figures following, to-wit:

*Certificate of Evidence.*

IN U. S. CIRCUIT COURT,
Northern District of Illinois.

SHERMAN A. RICKER
*v.*
NATHAN POWELL ET AL.

This is to certify that on the twenty-first day of May, 1879, Sherman A. Ricker filed his petition for leave to file a Bill to review the record, proceedings and decree in a certain cause in this Court, wherein Nathan Powell was complainant, and H. H. Walker and others, defendants, and applied on such petition and accompanying papers for such leave on said 21st day of May; and on application, there was read on behalf of said Ricker, in addition to the said petition, the affidavits of Samuel J. Walker, Joseph E. Smith, Melville W. Fuller and A. C. Reed, filed in this Court March 3d, 1879, on a prior application, as follows:

UNITED STATES OF AMERICA,
Northern District of Illinois. } ss.

In the Circuit Court of the United States, in and for the Northern District of Illinois.

NATHAN POWELL
*v.*
HENRY H. WALKER,
SAM'L J. WALKER AND OTHERS.

*To the Honorable Judges of said Court in Chancery sitting:*

The Petitioner, Sherman A. Ricker, one of the defendants in the above entitled cause, respectfully represents that a decree was rendered in said cause on the 5th day of June, A. D. 1875, which was subsequently reversed in part by the Supreme Court of the United States, and said cause remanded, and a new decree entered therein, in no respect different from the original decree, excepting in allowing the statutory right of redemption.

That he is advised that said decree is erroneous, and ought to be reviewed and reversed, and set aside for many apparent errors and imperfections, which are set forth in the bill of review, which your petitioner presents to the court as an exhibit to this petition.

Your petitioner further represents that since the rendition of said decree, your petitioner has discovered new matter of consequence in said cause, which is particularly set forth in said bill of review, to which your petitioner refers as an exhibit, and which new matter your petitioner did not know, and could not by reasonable diligence have known so as to make use thereof in the said cause previous to, and at the the time of the pronouncing of the said decree.

Your petitioner refers upon this application to the papers in said cause and to the bill of review, which he desires to file, as an exhibit,

and to the accompanying affidavits of Samuel J. Walker, Melville W. Fuller and Josph E. Smith.

Your petitioner therefore prays that he may be at liberty to file a bill of review, for the purpose of having said decree reviewed, reversed and set aside, or modified, as prayed in said bill of review, and that no further proceedings may be had under the same until so modified.

Your petitioner further says that the property described in said bill of review, and in the original bill herein, is advertised for sale on the 17th day of March, 1879, and your petitioner therefore prays for an order staying said sale until the determination of this application.

Your petitioner further shows that the property covered by said mortgage is worth at least two hundred thousand dollars, and is ample security for the amount decreed as due upon the complainant's mortgage.

SHERMAN A. RICKER.

STATE OF ILLINOIS, } ss.
Cook County, }

Personally comes Sherman A. Ricker, and being duly sworn, on oath declares and says that he signed the foregoing petition; that he has heard the same read, and knows its contents, and that the same is true, to the best of his knowledge, information and belief.

SHERMAN A. RICKER.

Subscribed and sworn to before me, this 3d day of March, A. D. 1879.

[SEAL.] JOHN MORRIS, *Notary Public.*

UNITED STATES OF AMERICA, } ss.
Northern District of Illinois, }

In Circuit Court of the United States, in and for said Northern District.

NATHAN POWELL
*v.* } In Chancery.
SAMUEL J. WALKER ET AL. }

STATE OF ILLINOIS, } ss.
County of Cook, }

Joseph E. Smith, being duly sworn, deposes and says, that as a member of the then firm of Fuller and Smith, he was one of the solicitors of Sherman A. Ricker, one of the defendants in the above entitled cause; that as such solicitor he frequently attended before Henry W. Bishop, Esq., Master in Chancery of said Court, to whom said cause had been theretofore referred to take proofs and report. That he well recollects the proceedings had before said Bishop, as such Master in Chancery, the report made by him to the Court herein, and the proceedings subsequently had thereon before the Court, and thereupon affiant says that certain exceptions were drawn and filed by affiant in behalf of said defendant Ricker to the report of said Master as first made to said Court, one or more of which exceptions was sustained by the Court, and said report was reformed by

said Master in conformity to the decision of the Court sustaining said exceptions. That by the report as finally made to, and confirmed by the Court, as affiant remembers, block sixteen (16), part and parcel of the mortgaged premises in the Bill of Complaint described, was to be sold prior to the sale of block fourteen (14), the property of the said defendant Ricker, which block sixteen (16) was, in affiant's judgment, amply sufficient to respond the amount due on complainant's mortgage. That affiant carefully examined said report, and was himself so far satisfied with the same, that he informed his client, the said Ricker, that in his, affiant's judgment, his rights were protected thereby, and advised that no further exception be taken to the report as reformed.

Affiant says further, that subsequent to the entry of the order of confirmation of said report, the solicitor for the complainant in said cause, Junius Mulvey, Esq., submitted to affiant a draft of a decree, which said draft pursued the Master's report as reformed, and ordered the sale of said block sixteen (16), to wit: first the north 201 feet, and next the south 100 feet of said block sixteen (16), prior to the sale of said block fourteen (14), and that there was no provision therein whereby said block sixteen (16), or any part of the same, was to be sold subject to the encumbrance of the Kinney mortgage or trust deed, so-called, or subject to any encumbrance whatsoever. That affiant proposed, as his recollection now is, the insertion in said draft of decree of certain findings and orders relating to the Tillinghast interest, so-called, to which said Mulvey assented, and said draft was accordingly changed in that respect, and as so changed was subsequently, and as affiant thinks, on or about the same day, ordered to be entered in said cause. That affiant carefully examined said decree, so drafted as aforesaid, and was so far satisfied with the same, that he did not think it advisable for the said defendant Ricker to pray an appeal therefrom, and accordingly no appeal therefrom was prayed by said Ricker.

Affiant says further, that the said decree at the time last aforesaid, to wit: at the time the same was agreed upon by affiant and said Mulvey, and as affiant supposed, entered in said cause, did not contain as aforesaid, the words or any words making the sale of the said north 201 feet of said block sixteen (16), subject to the said trust deed to John G. Rogers, commonly called the Kinney mortgage or trust deed, as it now does, or to any incumbrance whatsoever; but that subsequent, as this affiant believes, to the order of entry of said decree, but at what time and under what circumstances this affiant is ignorant, the said decree was so changed as to order the sale of said north 201 feet, subject to said Kinney mortgage, or trust deed, the facts in relation to which are fully set forth in the petition to be filed herewith.

Affiant says further, that whether the said change was made before or after the said decree was finally entered herein, there was not in same, at the time he agreed to the entry thereof, any words excepting and reserving any interest acquired under said Kinney deed of trust from the sale of said north 201 feet, nor did he have any notice, nor so far as he knows, did his said firm have any notice that

application would be made to the court for a change of the terms of said decree in that regard, or for any change in the said decree; nor did he know that any such change was made therein till long subsequent to the making of the same, to wit: not until after the receipt by his said firm, from the clerk of the Supreme Court of the United States of a transcript of the record in said cause, which, as this affiant believes, was in December, 1877, or January, 1878. That no appeal was taken by said Ricker in said cause, because affiant fully believed that the decree, as entered, was in all respects the same as agreed upon by affiant and complainant's solicitor, as aforesaid.

Affiant says further, that he has been informed and believes, and on such information and belief, states the fact to be that the said Kinney mortgage, or trust deed, was at the time of the record of the deed of conveyance from Samuel J. Walker, and wife, to the defendant Ricker, to wit: April 5, 1873, the property of the said Samuel J. Walker, and that the same remained in his possession and under his control, and was not transferred to Greenebaum and Foreman, nor to anybody else, until months after the record of the deed to said Ricker, as aforesaid.

And affiant says, that this fact did not come to his knowledge, nor did he have any intimation of the same, until within thirty days last past.

JOSEPH E. SMITH.

Subscribed and sworn to before me, this third day of March, A. D. 1879.

[SEAL.] JOHN MORRIS, *Notary Public.*

IN UNITED STATES CIRCUIT COURT,
Northern District of Illinois.

NATHAN POWELL,
*v.*
S. J. WALKER, H. H. WALKER, SHERMAN A. RICKER, AND OTHERS.

STATE OF ILLINOIS,
Cook county. } ss.

Personally comes Melville W. Fuller, and being duly sworn, on oath declares and says, that he argued the exceptions to the Master's report, as originally made in this cause on behalf of defendant, Sherman A. Ricker, the cause being in the particular charge of affiant's then partner, Mr. J. E. Smith, for said Ricker.

That the exceptions were sustained, and affiant understood the decree to have been entered in accordance with the decision upon said exceptions; that said Smith attended to the decree and affiant did not.

That in about January, 1878, the printed transcript of the record in said cause in the Supreme Court, was sent affiant from Washington, and an examination thereof disclosed that in the decree in ordering the sale of the north 201 feet of block 16, Packer's subdivision, the interest, estate, &c., acquired by John G. Rogers, under a trust deed

to him by one Kinney, and the interest of Greenebaum and Foreman thereunder, was excepted, which was not the fact in regard to the Master's report, as reformed after the exceptions of defendant Ricker were sustained to the original report. That affiant believes this was the first information or intimation he had of any change in the order of sale prejudicial to said Ricker, though he has a faint recollection of hearing in the spring of 1877, perhaps February, that defendant Orvis complained of some change; nor was any notice ever given to or served upon affiant that any change was applied for.

Affiant further says, that in January, 1879, in conversing with Sam'l J. Walker about this case, said Walker informed affiant that he, Walker, owned and held the note secured by the Rogers trust deed in the summer of, or fall of, 1873, and that it was not negotiated until September or October, 1873, and this was the first information or intimation to that effect that affiant had, to the best of his knowledge, information, recollection and belief.

MELVILLE W. FULLER.

Subscribed and sworn to before me, this 3d day of March, A. D. 1879.

[SEAL.] JOSEPH E. SMITH, *Notary Public.*

IN UNITED STATES CIRCUIT COURT,
In and for Northern District of Illinois,

NATHAN POWELL
*v.*
SAM'L J. WALKER and others, } In Chancery.

STATE OF ILLINOIS,
Cook County, } ss.

Personally comes Samuel J. Walker, and being duly sworn, on oath declares and says that he sold block 16, in Packer's subdivision of the N. E. ¼ of the S. W. ¼ of section 5, &c., to J. D. Kinney, and conveyed the same to him by warranty deed, in November, 1872; and said Kinney gave to affiant, as part of the purchase price, his note for $12,000, secured by trust deed to J. G. Rogers. That this note and trust deed affiant took, with the intention of devoting the same or its proceeds to the payment of the balance due on the mortgage to Mr. Powell. That affiant held said note and trust deed for many months, and finally left the same, in the latter part of the summer or early part of the fall of 1873, with A. C. Reed, for the purpose of negotiating the same through said Reed.

That after the panic of September, 1873, which occurred in the latter half of that month, Reed having advanced his check at a few days previous to that time, payable or to be presented at a short date, for some $6,500 or $7,500 or thereabouts, which check affiant had given Greenebaum and Foreman just before the panic, and in the month of October, according to affiant's best recollection, at Reed's request and solicitation, and that of Greenebaum and Foreman affiant consented to the delivery to Greenebaum and Foreman of said note and trust deed, to take up said Reed's check, Greenebaum and Foreman paying said Reed in addition some $2,000

or $2,500, the whole amount of check and cash being about $9,500, on condition that affiant might redeem the same by paying the amount and interest.

That affiant informed Melville W. Fuller, in January, 1879, that he, this affiant, held and owned said note, until late in the summer or early in the fall of 1873, as was the fact, but had not informed the defendant Ricker or his counsel of such fact prior to said January, 1879. SAMUEL J. WALKER.

Subscribed and sworn to before me, this third day of March, A. D. 1879.

[SEAL.] JOSEPH E. SMITH. *Notary Public.*

IN UNITED STATES CIRCUIT COURT, Northern District of Illinois.

NATHAN POWELL, *v.* S. J. WALKER and others. } In Chancery

STATE OF ILLINOIS, Cook County. } ss.

Personally comes A. C. Reed, and being duly sworn, on oath declares and says, that the note of J. D. Kinney, secured by trust deed to Rogers, was left with this affiant by S. J. Walker in August or September, 1873, to the best of affiant's recollection.

A. C. REED.

Subscribed and sworn to before me, this 3d day of March, A. D. 1879.

[SEAL.] JOSEPH E. SMITH, *Notary Public.*

(Endorsed:)
Filed March 3d, 1879.
WM. H. BRADLEY, *Clk.*

And also the affidavit of S. J. Walker, filed herein May 21st, 1879, as follows:

In Circuit Court of the United States, in and for Northern District of Illinois.

NATHAN POWELL *v.* HENRY J. WALKER, SAMUEL J. WALKER ET AL.

STATE OF ILLINOIS, Cook County. } ss.

Personally comes Samuel J. Walker, and being duly sworn, on oath declares and says, that he has already made an affidavit filed herein March 3d, 1879; and he says in addition thereto, that after the panic of 1873, and before and at the time the Kinney note or notes and trust deed to Rogers were given to Greenebaum and Foreman, he, this affiant, was wholly insolvent, and to the knowl-

edge of said Greenebaum and Foreman, unable to pay his paper when it matured, and which was out in large quantities, past due.

Affiant further says, that before he consented to let Greenebaum and Foreman have said Kinney note or notes and trust deed, some considerable negotiations were had, in the course of which he explained to them that said note or notes and trust deed were intended by affiant to satisfy the Powell mortgage, and that affiant had taken and held them for that purpose.

And affiant further says, that it was the understanding and agreement with Kinney in giving the note or notes, that they were to go to pay off the Powell mortgage, and this was the reason affiant had not negotiated them, and the cause of the delay in the recording of said trust deed.

Affiant further says, that at the time he conveyed to said Kinney block 16, he agreed with said Kinney to procure a conveyance from Coolbaugh and Powers of said block, to whom it had been conveyed prior to the deed to Kinney, but did not procure such conveyance until after Kinney had re-sold said block to affiant, and affiant to Orvis and Flanagan, in February, 1874, or about that time.

SAM'L J. WALKER.

Subscribed and sworn to before me this 21st day of May, 1879.

[SEAL.] HENRY M. SHEPARD, *Notary Public.*

(Endorsed):
Filed May 21, 1879.
WM. H. BRADLEY, *Clk.*

And also the proposed Bill of Review, as follows:

UNITED STATES OF AMERICA, }
Northern District of Illinois, } ss.

In the Circuit Court of the United States, in and for the Northern District of Illinois.

*To the Honorable Judges of said Court in Chancery sitting:*

Your orator, Sherman A. Ricker, of the county of Cook, State of Illinois, and of the district aforesaid, respectfully represents unto your Honors, that on the 23d day of July, 1874, one Nathan Powell, of the State of Indiana, and a citizen of said State, exhibited his original Bill of Complaint in this honorable Court, against Henry H. Walker, Samuel J. Walker, William F. Coolbaugh, Heman G. Powers, Emerson G. Orvis, Elias Greenebaum, Gerhard Foreman, Brian Philpot, Adaline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, Addie R. Coolbaugh, Sarah E. Powers, Wirt Dexter, John Brennock, —— Brennock, Julius Rosenthal, Mary E. Orvis, John Somes, William P. Frailey, William Flannagan, —— Flannagan, Abraham Wilsinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, The Northwestern Fertilizing Company, The Third National Bank of St. Louis, James Q. Minschold, John P. Squire and your orator, and thereby set forth that one Henry H. Walker, on or about the 8th

day of April, A. D. 1869, executed and delivered to said complainant a certain indenture of mortgage, bearing that date, to secure a certain promissory note therein mentioned, thereby conveying the northeast quarter of the southwest quarter of section number 5, in township number 38, north range 14, east of the 3rd principal meridian, and praying for a foreclosure of said mortgage to make a balance alleged to be due upon said note: and your orator filed his answer to the same on the 2d day of November, 1874, setting up that he was, as he still is, the owner of a parcel of the property described in said mortgage, and various other facts and circumstances hereinafter set forth, to which answer the said complainant, in said original bill, Powell, filed his replication.

Your orator further shows unto your Honors, that after the execution of the mortgage in question, by said Henry H. Walker to said Nathan Powell, and on the 12th day of April, 1870, the said Henry H. Walker conveyed to Samuel J. Walker by quit-claim deed, recorded September 19th, 1870, in the recorder's office of Cook county, Illinois, the northeast quarter of the southwest quarter of section 5, township 38, north range 14, east: and that on the 30th day of September, 1870, a certain plat entitled Packer's subdivision of the northeast quarter of the southwest quarter of section 5, township 38, north range 14, being a subdivision by Samuel J. Walker, was made and recorded, in and by which subdivision the said northeast quarter, etc., was divided into certain blocks, numbered 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18; that on the 19th day of September, 1870, a release deed by said Powell to Henry H. Walker, was recorded, releasing, or purporting to release, the north half of said northeast quarter from the aforesaid mortgage. That on the 1st day of July, 1872, by warranty deed, Samuel J. Walker and wife conveyed to William F. Coolbaugh and Heman G. Powers blocks 7, 12, 13, 14, 16, 18, and the south 187 25-100 feet of block 8, of said acker's subdivision, which deed was recorded Dec. 7, 1872.

That on the 25th day of February, 1873, said Coolbaugh and wife and said Powers and wife conveyed to said Samuel J. Walker block 14 of said Packer's subdivision, which deed was recorded April 3, 1873.

That on the 25th day of February, 1873, by warranty deed, recorded April 5, 1873, Samuel J. Walker and wife conveyed to your orator, Sherman A. Ricker, said block 14, for which your orator paid good and valuable consideration in cash, to wit: the purchase price thereof, in full, at that date, and upon which he has erected improvements at a cost of from 80 to $85,000.

That on the 25th day of November, 1872, Samuel J. Walker and wife conveyed to one John D. Kinney, by warranty deed, recorded Dec. 2, 1872, blocks numbered 7 and 16, in said Packer's subdivision, and on the 23d day of October, 1873, a trust deed was recorded purporting to have been executed by said John D. Kinney to John G. Rogers, and to convey said block numbered 16, and given to secure the note of said Kinney for part of the purchase money thereof; and on the 16th of April, 1874, a release deed from said Rogers, trustee, to Kinney, of the south 100 feet of said block 16, [illegible] dated April 8th, 1874.

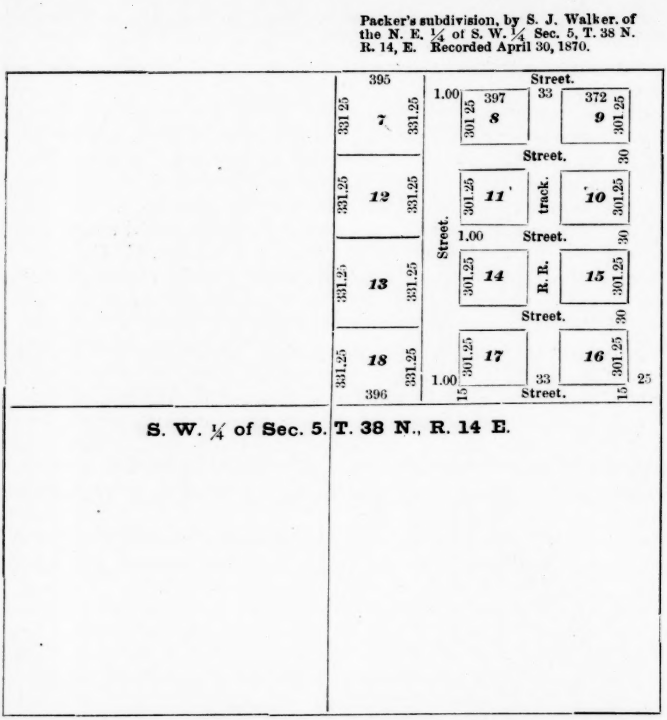
That on the 4th of April, 1874, was recorded a memorandum receipt of S. J. Walker to Wm. Flannegan, dated Feb. 27th, 1874, acknowledging a payment on account of the purchase of the north 200 feet of said block 16. That on April 15th, 1874, there was recorded a warranty deed of the north 201 feet of said block 16, of Henry H. Walker to William Flannagan, dated Feb. 27, 1874.

That on Feb. 26, 1874, was recorded an agreement, dated Feb. 26, '74, of Samuel J. Walker and Henry H. Walker, with Emerson G. Orvis, for conveyance of south 100 feet of said block 16; and on April 9th, 1874, was recorded a warranty deed of said south 100 feet of said block 16, by Henry H. Walker to Emerson G. Orvis.

That on the 16th day of March, 1874, a quit claim deed, dated March 6, 1874, of said block 16, by John D. Kinney and wife to Henry H. Walker, was recorded.

Your orator further shows unto your Honors, that on the 3d day of September, 1874, articles of agreement were made and executed by said Coolbaugh and Powers and Samuel J. Walker, of the first part, and Louisa M. Tillinghast, of the second part, for the conveyance to said Louisa M. Tillinghast of the south half of block 18, in said Packer's subdivision, which said south half was declared by said agreement to have been sold to Mrs. Tillinghast for the consideration therein mentioned.

Your orator further shows that the following shows, as your orator is informed, the title of the said blocks, so far as necessary or material to be considered upon this application.




Powell to H. H. Walker. Deed, April 1, 1869. Recorded May 25, 1869. Con. undivided ¼ of S. W. ¼, Sec. 5, T. 38, N., R. 14 E.

H. H. Walker to Powell. Mort. April 8, 1869. Rec. May 25, 1869. Con. N. E. ¼ of S. W. ¼ of Sec. 5, T. 38 N., R. 14 E.

Powell to H. H. Walker. Release, Sept. 12, 1870. Rec. Sept. 19, 1870. N. ½ of N. E. ¼ of S. W. ¼, Sec. 5, T. 38, N., R. 14 E.

H. H. Walker to S. J. Walker. Quit C. Deed April 12, 1870. Rec. Sept. 19, 1870. N. E. ¼ of S. W. ¼, Sec. 5, T. 38, N., R. 14 E.

Block 13.—S. J. Walker to Philpot. War. Deed, Sept. 10, 1870. Recorded Dec. 9, 1870.

Philpot to Rogers. Trust Deed, Sept. 10, 1870. Recorded Oct. 31, 1870.

S. J. Walker to Coolbaugh and Powers. War. Deed, July 1, 1872. Recorded Dec. 7, 1872.

Block 14. S. J. Walker to Coolbaugh and Powers. War. Deed, July 1, 1872. Recorded Dec. 7, 1872.

Coolbaugh and Powers to S. J. Walker. Quit C. Deed, Feb. 25, 1873. Recorded Apr. 3, 1873.

Coolbaugh and Powers to S. J. Walker. Quit C. Deed, Feb. 25, 1873. Recorded Oct. 27, 1873.

S. J. Walker to Ricker. War. Deed, Feb. 25, 1873. Recorded Apr. 5, 1873.

BLOCK 15. S. J. Walker to Hoffman. Trust Deed, Sept. 26, 1870. Recorded Sept. 29, 1870.

S. J. Walker to P. Brennock. War. Deed, Mar. 8, 1872. Recorded Oct. 10, 1872.

P. Brennock to J. Brennock. War. Deed, May 23, 1874. Recorded June 26, 1874.

J. Brennock to Rosenthal. Trust Deed, June 5, 1874. Recorded June 29, 1874.

S. ONE HUNDRED FT. OF BLOCK 16.—S. J. Walker to Pickett. War. Deed. Oct. 1, 1870. Recorded Oct. 5, 1870.

Pickett to Wheeler. Trust Deed, Oct. 1, 1870. Recorded Oct. 5, 1870.

Pickett to S. J. Walker. Quit C. Deed, Sept. 20, 1871. Recorded Sept. 28, 1871.

S. J. Walker to Kinney. War. Deed, Nov. 25, 1872. Recorded Dec. 2, 1872.

S. J. Walker to Coolbaugh and Powers. War. Deed, July 1, 1872. Recorded Dec. 7, 1872.

Kinney to Rogers. Trust Deed, Nov. 25, 1872. Recorded Oct. 23, 1873.

Coolbaugh and Powers to S. J. Walker. Quit C. Deed, Feb. 25, 1874. Recorded Apr. 15, 1874.

S. 100 ft. lot 16. S. J. Walker and H. H. Walker, with Orvis. Agreement to convey by War. Deed, Feb. 26, 1874. Recorded Feb. 26, 1874.

S. 100 ft. lot 16. H. H. Walker to Orvis. War. Deed, Feb. 26, 1874. Recorded Apr. 9, 1874.

S. 100 ft. lot 16. Orvis to Greenebaum. Trust Deed, Feb. 26, 1874. Recorded Apr. 9, 1874.

Lot. 16. Kinney to H. H. Walker. Quit C. Deed, Mar. 6, 1874. Recorded Mar. 16, 1874.

S. 100 ft. lot 16. Rogers to Kinney. Release Apr. 8, 1874. Recorded Apr. 16, 1874.

Lot 16. S. J. Walker to H. H. Walker. Quit C. Deed, Apr. 11, 1874. Recorded Apr. 15, 1874.

S. 100 ft. lot 16. Orvis to Somes. Trust deed, Apr. 15, 1874. Recorded May 12, 1874.

BLOCK 17.—S. J. Walker to Pickett. War. Deed, Oct. 1, 1870 Recorded Oct. 5, 1870.

Pickett to Wheeler. Trust Deed, Oct. 1, 1870. Recorded Oct. 5, 1870.

Pickett to S. J. Walker. Quit C. Deed, Sept. 20, 1871. Recorded Sept. 28, 1871.

S. J. Walker to Ralston. War. Deed, Oct. 2, 1871. Recorded Sept. 4, 1872.

Ralston to Rogers. Trust Deed, Oct. 2, 1871. Recorded Sept. 4, 1872.

Ralston to N. W. Fer. Co. Quit C. Deed, Oct. 3, 1871. Recorded Sept. 4, 1872.

N. TWO HUNDRED AND ONE FEET OF BLOCK 16.—S. J. Walker to Pickett. War. Deed, Oct. 1, 1870. Recorded Oct. 5, 1870.

Pickett to Wheeler. Trust Deed, Oct. 1, 1870. Recorded Oct. 5, 1870.

Pickett to S. J. Walker. Quit C. Deed, Sept. 20, 1871. Recorded Sept. 28, 1871.

S. J. Walker to Kinney. War. Deed, Nov. 25, 1872. Recorded Dec. 2, 1872.

S. J. Walker to Coolbaugh and Powers. War. Deed, July 1, 1872. Recorded Dec. 7, 1872.

Kinney to Rogers. Trust Deed, Nov. 25, 1872. Recorded Oct. 23, 1873.

Coolbaugh and Powers to S. J. Walker. Quit C. Deed, Feb. 25, 1874. Recorded Apr. 15, 1874.

N. 200 ft. of lot 16. S. J. Walker to Flanagan. Receipt, Feb. 27, 1874. Recorded Apr. 4, 1874. At date of receipt the title was in Kinney.

N. 201 ft. of lot 16. H. H. Walker to Flanagan. War. Deed, Feb. 27, 1874. Recorded Apr. 15, 1874.

N. 201 ft. lot 16. Flanagan to Rogers. Trust Deed, Feb. 27, 1874. Recorded Apr. 15, 1874.

Lot. 16. Kinney to H. H. Walker. Quit C. Deed, Mar. 6, 1874. Recorded Mar. 16, 1874.

Lot 16. S. J. Walker to H. H. Walker. Quit C. Deed, Apr. 11, 1874. Recorded Apr. 15, 1874.

BLOCK 18.—S. J. Walker to Pickett. War. Deed, Oct. 1, 1870. Recorded Oct. 5, 1870.

Picket to Wheeler. Trust Deed, Oct. 1, 1870. Recorded Oct. 5, 1870.

Pickett to S. J. Walker. Quit C. Deed, Sept. 20, 1871. Recorded Sept. 28, 1871.

S. J. Walker to Coolbaugh and Powers. War. Deed, July 1, 1872. Recorded Dec. 7, 1872.

Coolbaugh & Powers and S. J. Walker with Tillinghast. Contract of Sale of S. ½ of block 18, dated Sept. 3, 1874.

And your orator charges upon the record in said original cause of Powell against S. J. Walker and others, and information and belief, that the trust deed to Rogers, upon said block 16, was given to secure said J. D. Kinney's note to said Samuel J. Walker, and was in legal effect a mortgage to said Walker to secure said note.

And your orator further shows unto your Honors, that various of the defendants to the Original Bill of said Powell, having answered, the premises and issue being made up thereon, the cause was referred to the Master in Chancery of this Court to take proofs and report thereon, to wit: on the 5th day of November, A. D. 1874. That on the 27th day of March, 1875, said Master made a report of the evidence, and in addition thereto certain conclusions thereon as

to the order in which the property described in said Original Bill of Complaint, should be sold under decree, and attempting to apply the rule of the inverse order of the alienation, although not within the terms of the reference aforesaid, and in and by said report, said Master erroneously reported that your orator's said property, said block fourteen (14), should be sold first; second, the north 201 feet of block 16; third, the south 100 feet of said block 16; fourth, blocks 13 and 18; fifth, blocks 15 and 17.

That on the 5th day of April, 1875, your orator filed exceptions to said report, insisting that block 16 should be sold before said block 14, and that the 201 feet and the 100 feet should be sold before block 14, and that the south half of block 18 should be sold before block 14, and should be first sold, and upon other errors.

That on the 15th day of May, 1875, after a hearing on said exceptions, the same were sustained so far as said block 14 was concerned, and it was ordered that the Master's report be reformed accordingly. And said Master thereupon reformed his report, so as to provide therein for the sale, first, of the north 201 feet of block 16; second, the south 100 feet of said block 16; third, block 14.

Your orator further shows unto your Honors, that on the 5th day of June, 1875, a decree was entered in said cause, which, as recorded, directed the sale of said property for the satisfaction of said mortgage, in the following order:

*First*—The north 201 feet of block 16, excepting therefrom the estate, right, title, interest, etc., of John G. Rogers and of Greenebaum and Foreman, under the trust deed executed by Kinney to Rogers, hereinbefore spoken of.

*Second*—The south 100 feet of said block 16.

*Third*—Block 14.

*Fourth*—The estate, right, title and interest, etc., of said Rogers, Greenebaum and Foreman in said north 201 feet of block 16, thereinbefore excepted and reserved.

*Fifth*—Blocks 13 and 18.

*Sixth*—Block 15.

*Seventh*—Block 17.

And your orator shows unto your Honors, that he was not aware, nor did his attorneys become informed, as he is advised and believes until December, 1877, or January, 1878, that the decree so entered as above had changed the order as it appeared in the Master's amended report. That the decree, as originally prepared by counsel, and shown to one of your orator's solicitors pursued, as to the order of sale, the Master's report as finally made, and such was the decree which was to be, and which your orator believed was, entered of record.

That the original draft of said decree pursued the order as last designated by the Master, and in providing for the sale of the north 201 feet of block 16, provided that it should be sold free from, and did not except therefrom the estate, right, title and interest of said Rogers and said Greenebaum and Foreman therein, but

the decree as recorded does make that exception, so that only the equity of the 201 feet is to be sold prior to block 14, besides the 100 feet.

That a copy of said original draft is hereunto annexed, marked "A" which shows, as your orator charges is the fact, that the exception in question was interlined upon said decree, but when your orator does not know, nor under what circumstances, but your orator says that said decree, as so changed, was entered without notice to your orator or his solicitors; and your orator believes, that, owing to the number of parties and counsel, some mistake supervened in reference thereto, but how or under what circumstances your orator cannot state, but does state that the decree was changed without the knowledge of or notice to your orator or his solicitors.

But your orator says that the decision upon the exceptions, and which was pursued in the Master's amended report, was that said north 201 feet should be sold without the exception in question; then the south 100 feet—making all of block 16—before any attempt was made to sell your orator's block, namely, block 14.

Your orator further says, that an appeal was prayed from said decree by one of the defendants thereto, one Orvis, claiming title to the south 100 feet of said block 16, and appeal bond filed Aug. 16, 1875, and it was, as your orator is informed and believes, upon receiving a transcript of the record in the Supreme Court of the United States, as printed and issued by the clerk thereof, in about December, 1877, or January, 1878, that the discovery was made of the change in the decree, as aforesaid. That the decree was subsequently reversed, because not allowing the statutory right of redemption, and the cause remanded, with directions to amend in that particular, and that otherwise said decree should stand, and the amendment having been made, said decree was re-entered herein, to wit: on the 8th day of February, A. D. 1879.

And thereupon the Master in Chancery of this Court advertised said real estate for sale on the 17th day of March, 1879, under the decree aforesaid, to be sold in the order therein designated, and your orator on the 3d day of March, 1879, applied to this Court upon petition and affidavits, for leave to file a bill of review, substantially setting forth the facts aforesaid, and for a restraining order to be issued to stay the sale of said real estate in the meantime; that pending said application, the mandate of the Supreme Court, under which said decree had been reinstated, was recalled, and this cause thereby again removed from this Court to the Supreme Court; and upon reargument, said decree, upon the appeal of said Orvis, was again affirmed, on or about May 5th, 1879, and the mandate of the Supreme Court was sent down and filed herein May 15th, 1879, and an order thereon entered for the Master of this Court to proceed and advertise said property for sale, and sell the same in the order in said decree mentioned, which said Master is about to do.

And your orator further represents that the said decree is erroneous, and ought to be reviewed, reversed and set aside, and modified for several reasons, among others the following:

That upon said record it is apparent that the south half of block 18 should have been decreed to be first sold.

SECOND. Because upon said record it is apparent as matter of law, that the north 201 feet of said block 16 should have been decreed to be sold without the exception of the estate interest, etc., of Rogers and Greenebaum and Foreman; or if such exception were made, then that the interest, estate, etc., of Rogers, etc., should be sold third or fourth, and before block 14 in any event, inasmuch as the trust deed given to Rogers by Kinney, or purporting to have been so given, and which was equivalent to a mortgage to Samuel J. Walker was not recorded until the 23d day of October, 1873, many months after your orator acquired recorded title to block 14, in ignorance of the fact of the existence of said trust deed, and which trust deed was given to secure the note of said Kinney, given to said S. J. Walker upon the conveyance by him to Kinney of the said block, as the record in said cause discloses; and for divers other errors in the order of sale as delineated in said decree, assuming that the rule of inverse order of alienation should have been pursued by the court, which your orator, under the circumstances of this case, respectfully denies.

For which errors and imperfections in the said decree appearing upon the face thereof, and the record of said proceedings to which your orator hereby refers, your orator has brought this Bill of Review, to be relieved in the premises.

Your orator further represents, by leave of this Honorable Court first had and obtained for that purpose, that since the rendition of said decree your orator has discovered new matter of consequence and material in said cause, particularly that the said Samuel J. Walker, from the time of the execution of the note by John D. Kinney, purporting to have been secured by the trust deed on block number 16, of John D. Kinney to John G. Rogers, to September, 1873, held and owned the said note. That he had left the same with one Reed for negotiation in said month of September. That in October, 1873, said note was transferred to Greenebaum and Foreman as security for the sum of $9,000 or $9,500, or if sold to them, was sold with right of redemption; and that the trust deed was delivered to said Greenebaum and Foreman in said October, 1873, along with the said note, and which said trust deed was not recorded until the 23d day of said October.

That of the $9,000 or $9,500, an overdue check was held by Greenebaum and Foreman on the City Bank for about $7,000, which had been given to said Greenebaum and Foreman prior to the panic of 1873, which set in about September 23d, 1873, by Samuel J. Walker, and that said check was taken up after said panic had commenced, and about the 23d of October, 1873, by the Kinney note and Rogers trust deed, belonging at the time of said transaction to said Samuel J. Walker, who was then and there wholly insolvent and unable to meet his paper as it matured, or to pay his debts, as was well known to Greenebaum and Foreman when they took said Kinney notes and Rogers trust deed from said Samuel J. Walker.

Your orator further shows unto your Honors, that at the time block 16 was conveyed to said Kinney, he was informed that the said block

had been theretofore conveyed to Messrs. Coolbaugh and Powers, and said Samuel J. Walker agreed with said Kinney to procure of said Coolbaugh and Powers their conveyance of the same, which he did, but not until February, 1874.

Your orator further shows unto your Honors, that when said S. J. Walker obtained said Kinney notes and trust deed to Rogers, it was upon the understanding and agreement with said Kinney, that they were to be applied to pay off said Powell mortgage, and when said Walker parted with said notes and trust deed to Greenebaum and Foreman, said Greenebaum and Foreman were well aware that said Walker had taken and held the same to apply in payment of the Powell mortgage.

And your orator further shows unto your Honors, that this new matter your orator did not know, and could not by reasonable diligence have known, so as to make use thereof in the said cause previous to, and at the time of, the hearing and the entry of the said decree; but that your orator first learned of the existence of the said newly discovered evidence about the beginning of February, A. D. 1879, and is informed that it came to the hearing of his counsel in January, 1879, except the facts stated in the two preceding paragraphs, knowledge or information of which did not come to your orator or his counsel, until in May, 1879.

And your orator is advised that the said new matter is material and of consequence, because it shows, as matter of fact, that in the order of sale, the said north 201 feet of block 16, should be sold without the exception of said incumbrance and free therefrom, or if said interest, &c., created by said Rogers trust deed should be excepted, then it should be sold third, and at all events before the said block 14, and that said decree is erroneous on that account. And your orator insists that under the circumstances aforesaid, the said decree, in consequence of the discovery of such new matter as aforesaid ought to be reviewed and reversed in whole, or in the part referred to.

Your orator further shows unto your Honors, that since the filing of the original Bill of Complaint herein, the said Samuel J. Walker has been adjudicated a Bankrupt in the United States District Court, in and for the Northern District of Illinois, and that one R. E. Jenkins has been duly elected and appointed his Assignee in Bankruptcy, and should be made party defendant hereto, as your orator prays accordingly; and your orator also prays that Louisa M. Tillinghast may be made party defendant hereto.

Your orator further shows unto your Honors, that the Master in Chancery of this Court is about to advertise said real estate for sale, and to sell the same, in the order prescribed by said decree: and that your orator, if said Master is permitted to proceed, will thereby be subjected to irreparable injury in the premises, and that your orator is, in view of the facts hereinbefore set forth, entitled to, and hereby prays for an order restraining said Master from proceeding under said decree, pending the review thereof.

Forasmuch therefore, as your orator is without remedy in the premises, except in a Court of equity, to the end that the said Nathan

Powell, Elias Greenebaum, Henry H. Walker, Samuel J. Walker, R. E. Jenkins, Assignee in Bankruptcy of Samuel J. Walker, Louisa M. Tillinghast, William F. Coolbaugh, Heman G. Powers, Emerson G. Orvis, Gerhard Foreman, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, Addie R. Coolbaugh, Sarah E. Powers, Wirt Dexter, John Brannock, ——— Brannock, Julius Rosenthal, Mary E. Orvis, John Somes, William P. Frailey, William Flannagan. ——— Flannagan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, The Northwestern Fertilizing Company, The Third National Bank of St. Louis, James Q. Minschall, John P. Squire (made parties defendant to this bill), may be required to make full and direct answer to the same, but not under oath, the answer under oath being hereby waived, and that the said decree and proceedings thereon may be reviewed and reversed, in whole or in part, and no further proceedings taken thereon until the modification thereof; and that the decree be so modified as to provide for the sale of the south half of block 18 first; and that the north 201 feet of block 16 be next sold, free from the incumbrance of the trust deed to the said Rogers; and that the south 100 feet of block 16 be sold third, or if said 201 feet be sold subject to said Rogers trust deed, then that the estate, interest, &c. under said Rogers trust deed, be sold third or fourth, and all these before block 14 is sold, and that your orator may have such other or further relief in the premises as equity may require, and to your Honors may seem meet.

May it please your Honors to grant unto your orator the writ of summons directed to the defendants aforesaid, in the usual form, and also to enter herein an order restraining the sale upon said complainants' said mortgage until the hearing hereof, and the order and decree of this Honorable Court herein.

And your orator, as in duty bound, will ever pray, &c.

S. A. RICKER.

STATE OF ILLINOIS, } ss.
Cook County. }

Personally comes Sherman A. Ricker, and being duly sworn, on oath declares and says that he is the person who subscribed the foregoing Bill of Review, and is the complainant therein, and that he has heard said bill read and knows its contents, and that the same is true, to the best of his knowledge, information and belief.

S. A. RICKER.

Subscribed and sworn to before me, this 21 day of May, A. D. 187.

[SEAL] JOHN MORRIS, *Notary Public.*

(Endorsed:)

Filed as an exhibit May 21, 1879.

WM. H. BRADLEY, *Cl'k.*

[Exhibit "A" attached to said bill of review is a *fac simile* of the draft of decree in *Powell* v. *Walker and others*, showing the interlineations referred to in the bill of review].

And the entire record and proceedings in the said cause of Powell against Walker et al.

Pleas in the Circuit Court of the United States, for the Northern District of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday, the fifth day of June, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the ninety-ninth year.

WILLIAM H. BRADLEY, *Clk.*

NATHAN POWELL
*v.*
HENRY H. WALKER, SAMUEL J. WALKER, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brennock, Patrick Brennock, Julius Rosenthal, Emerson G. Orvis, Elias Greenebaum, Mary E. Orvis, John Somes, William P. Frailey, William Flannegan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, The Northwestern Fertilizing Company, The Third National Bank of St. Louis, James Q. Minschell, John P. Squire, Gerhard Foreman, Levi Abt, The International Bank, Charles S. Symonds and Daniel Pratt, assignees in bankruptcy of the People's Safe Deposit and Savings Institution of the State of New York. } In Chancery.

NORTHERN DISTRICT OF ILLINOIS, ss:

Be it remembered, that on the twenty-third day of July, A. D. 1874, came said complainant by his solicitor, and filed in the office of the clerk of the Circuit Court of the United States for said district, at Chicago, in the district aforesaid, his bond for costs, and also, at the same time, filed his Bill of Complaint in said entitled cause; which said Bill of Complaint is in the words and figures following, to-wit:

*Bill of Complaint.*

UNITED STATES OF AMERICA, Northern District of Illinois, } ss.

To the judges of the Circuit Court of the United States, for the Northern District of Illinois:

Nathan Powell, of the city of Madison, in the State of Indiana, and who is a citizen of the State of Indiana, brings this his Bill of Complaint against Henry H. Walker, Samuel J. Walker, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis

A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Rieker, Wirt Dexter, John Brannock, ——— Brannock, Julius Rosenthal, Emerson G. Orvis, Mary E. Orvis, Elias Greenebaum, John Somes, William P. Frailey, William Flannigan, ——— Flannigan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, and the Northwestern Fertilizing Company, a corporation existing under and by the laws of Illinois, and all of whom are citizens of the State of Illinois, and residents of said district, and the Third National Bank of St. Louis, a corporation located and doing business in the city of St. Louis, in the State of Missouri, James Q. Minschall, a citizen of the State of Ohio, residing at Columbus, in said State of Ohio, and John P. Squire, a citizen of the State of Massachusetts, residing at the city of Boston, in said State of Massachusetts.

And thereupon your orator complains and says: That on or about the thirteenth day of March, in the year of our Lord one thousand eight hundred and sixty-nine, the said Henry H. Walker and Samuel J. Walker, two of the above named defendants, became and were indebted to your orator in the sum of forty thousand and five hundred dollars ($40,500.00), and being so indebted, in consideration thereof, the said Henry H. Walker and Samuel J. Walker, on the day and year aforesaid, made their certain promissory note in writing, bearing date the day and year aforesaid, and thereby, then and there promised to pay, twelve months after the date thereof, to the order of your orator, the sum of forty thousand five hundred dollars ($40,500.00), for value received, with interest from the day of the date thereof until paid, at the rate of ten per centum (10 per ct.) per annum, and then and there delivered the said promissory note to your orator.

And your orator further shows unto your Honor, that the said Henry H. Walker afterwards, on or about the eighth day (8th) of April, in the year of our Lord one thousand eight hundred and sixty-nine (1869), to secure the payment of the principal and interest mentioned in said note, executed and delivered to your orator his certain indenture of mortgage, under his hand and seal, bearing date the said eighth day of April, in the year of our Lord one thousand eight hundred and sixty-nine, and made or expressed to be made between the said Henry H. Walker, as party of the first part, and your orator, as party of the second part, and that thereby, after reciting as therein mentioned, it was witnessed; that for the better securing the payment of the money aforesaid, with interest thereon, according to the tenor and effect of the said promissory note above mentioned, and also in consideration of the further sum of one dollar in hand paid, by your orator, the receipt whereof was thereby acknowledged, the said Henry H. Walker did grant, bargain, sell and convey unto your orator, his heirs and assigns, forever, all the following described lot, piece or parcel of land, situate in the county of Cook, and State of Illinois, and known and described as follows, to wit: The northeast quarter of the southwest quarter of section number five (5), in township number thirty-eight (38) north, range

14, east of the third principal meridian, together with all and singular the tenements, hereditaments, privileges and appurtenances thereunto belonging, or in any wise appertaining, to have and to hold said granted, bargained and described premises, with the appurtenances, unto your orator, his heirs and assigns, to his and their only proper use, benefit and behoof, but subject to the proviso therein contained; and said indenture of mortgage was upon the express condition, nevertheless, that if the said Henry H. Walker, his heirs, executors or administrators, should well and truly pay, or cause to be paid to your orator, his heirs, executors, or administrators or assigns, the said principal sum of money mentioned in said promissory note, with interest thereon, at the time and in the manner specified in said note, according to the true intent and meaning thereof, that then and in that case the said indenture of mortgage, and everything therein expressed, should be absolutely null and void; all of which will more fully and at large appear by reference to said mortgage now in the possession of your orator, and ready to be produced and proved, as your Honor shall direct, and to which, for greater certainty, your orator prays leave to refer.

And your orator further shows unto your Honors, that the execution and delivery of said indenture of mortgage was afterwards, to-wit: On the 22nd day of May, A. D. 1869, duly acknowledged, according to law, by the said Henry H. Walker, before John P. Olinger, a notary public in and for, and residing in and for, the city of Chicago, in the county of Cook and State of Illinois, as will, on reference to the certificate of acknowledgment thereof, annexed to said mortgage, signed by John P. Olinger and attested by his notarial seal, more fully and at large appear, and to which, for greater certainty, your orator prays leave to refer.

And your orator further shows unto your Honor, that afterwards, to-wit: On the 25th day of May, A. D. 1869, said indenture of mortgage was filed for record in the office of the recorder, within and for the county of Cook aforesaid, and was duly recorded therein in book 133 of mortgages, at page 40, as by the record of said mortgage in said office, and also by the certificate of Norman T. Gassette, recorder of said county, endorsed upon said indenture of mortgage, signed by said Norman T. Gassette, as such recorder as aforesaid, sufficiently appears, and to which said certificate thereof your orator prays leave to refer, if it be necessary for your orator so to do.

And your orator further shows unto your Honors, that on or about the 17th day of September, in the year A. D. 1870, your orator received, as a payment of part of the principal sum of said note, the sum of twenty thousand five hundred dollars, and thereupon delivered his certain deed of release of date Sept. 12th, A. D. 1870, to said Henry H. Walker, in and by which said deed your orator released from the lien of said mortgage the north half of said mortgaged premises, and that your orator, upon receipt of such money, duly credited the same upon said note.

And your orator further shows unto your Honors, that afterwards, on or about the twelfth day of December, A. D. eighteen hundred and seventy, your orator received the further sum of eight thousand

dollars, on account of principal sum of said note, and which said two sums of twenty thousand five hundred dollars, and eight thousand dollars, so paid as aforesaid, your orator has applied toward the payment of said mortgage debt and in reduction thereof, and has duly credited the same thereon, leaving, after deducting such credits, at the date last aforesaid, a balance of twelve thousand dollars of the principal sum of said mortgage debt due, owing and unpaid to your orator, upon the security of the south half of said mortgaged premises.

And your orator further shows unto your Honor, that although said note has long since become due, neither the said Henry H. Walker nor the said Samuel J. Walker, nor any person or persons in their behalf, or on behalf of either of them, hath ever paid, or caused to be paid, to your orator the said balance of twelve thousand dollars of the said principal sum of forty thousand dollars and five hundred dollars of said promissory note, or any part thereof, nor the interest which has accrued thereon since the first day of November, in the year A. D. eighteen hundred and seventy-two, or any part thereof, but the same still remains wholly due and unpaid to your orator, contrary to the proviso of said mortgage; and that thereby the estate of your orator in the south half of said mortgaged premises hath become absolute at law, and that your orator hath caused application frequently and in a friendly manner to be made to the said Henry H. Walker, and requested him to pay the said balance of said principal sum and interest to your orator, or else to release his equity of redemption in and to said south half of said mortgaged premises.

And your orator well hoped that such, your orator's reasonable requests, would have been complied with, as in justice and equity they ought to have been, but now so it is, may it please your Honors, the said Henry H. Walker refuses so to do.

Your orator further shows unto your Honors, that said mortgaged premises, so remaining unreleased as aforesaid, are a very scanty and insufficient security for said balance of principal money, with the interest remaining due and unpaid upon said mortgage.

And your orator further shows unto your Honors, that Brian Philpot, Adeline M. Philpot, his wife, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, his wife, Sherman A. Ricker, Wirt Dexter, John Brannock, ——— Brannock, his wife, Julius Rosenthal, Emerson G. Orvis, Mary E. Orvis, John Somes, William P. Frailey, John P. Squires, William Flanagan, ——— Flanagan, his wife, the Northwestern Fertilizing Company, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, James Q. Minschall, Charles A. Belden, George Birkhoff, Mary Bond, the Third National Bank, of St. Louis, Abner Taylor, and Cyrus H. McCormick and Elias Greenebaum, the other of the defendants hereinbefore named, have or claim to have, some interest in the said mortgaged premises, or some part thereof, either as subsequent purchasers, incumbrancers, judgment-creditors or otherwise, and to be entitled to redeem the same, but they and also the said Henry H. Walker refuse so to do.

And your orator charges that the interest in the said mortgaged

premises, which the said Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brannock, Patrick Brannock, Julius Rosenthal, Emerson G. Orvis, Mary E. Orvis, John Somes, William P. Frailey, John P. Squire, William Flanagan, —— Flanagan, the Northwestern Fertilizing Company, Abraham Wilzinski, S. J. Marcus, John Miller, Atway Watson, James Q. Minschall, Chas. A. Belden, George Birkhoff, Mary Bond, The Third National Bank of St. Louis, Abner Taylor, Cyrus H. McCormick and Elias Greenebaum have, if any they or either of them have, in said premises, or any part thereof, accrued subsequent to the lien of the said mortgage to your orator, and is subject thereto, and that the said defendants ought to either pay what is due to your orator, as aforesaid, or to release their equity of redemption in said mortgaged premises, but they refuse so to do.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed for, full, true and perfect answers make (not under oath, answers under oath being hereby waived,) to all and singular the premises, as fully and particularly as if the same were hereinafter repeated, your orator prays that account may be taken under the direction of this court, of what is due and owing to your orator for principal-money and interest on his said mortgage, and that said defendants may be decreed to pay to your orator what may be found due to him, on taking such account, as aforesaid, together with his costs of this suit, by a short day, to be appointed by this honorable court for that purpose, or, in default thereof, that said premises may be sold, by and under the direction of this court, according to the rules and practice of this court, and the proceeds of such sale be applied to the payment of the amount due your orator as aforesaid, together with all costs and expenses; and that the said Henry H. Walker and the other defendants, and all persons claiming under them subsequent to the commencement of this suit, may be foreclosed and barred from all equity of redemption or claim of, in and to, the said mortgaged premises, and every part thereof; and that your orator may have such further and other relief in the premises as to your Honors shall seem meet and the nature of this case may require.

May it please your Honors to grant unto your orator the most gracious writ of subpœna of the United States of America, to be directed to the said Henry H. Walker, Samuel J. Walker, Brian Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brannock, ——— Brannock, Julius Rosenthal, Emerson G. Orvis, Mary E. Orvis, John Somes, William P. Frailey, John P. Squire, William Flanagan, ——— Flanagan, the Northwestern Fertilizing Company, Abraham Wilzinski, S. J. Marcus, John Miller, Atway Watson, James Q. Minschall, Charles A. Belden, George Birkhoff, Mary Bond, Third National Bank of St. Louis, Abner Taylor, Cyrus H. McCormick, Elias Greenebaum, thereby commanding them and every of them, at a certain day,

and under a certain pain therein to be specified, personally to be and appear before your Honors in this Honorable Court, then and there to answer all and singular the premises, and to stand to, perform and abide, such order and decree therein, as to your Honors shall seem meet; and your orator will ever pray, &c.

NATHAN POWELL,
by JUNIUS MULVEY,
*His Solicitor.*

(Endorsed:)
Filed July 23d, 1874.
WM. H. BRADLEY, *Cl'k.*

And on the —— day, to-wit: the 5th day of September, A. D. 1874, said defendant, John G. Rogers, filed in said clerk's office his answer in said entitled cause, which answer is in the words and figures following, to wit:

*Answer of John G. Rogers.*

United States of America, Circuit Court of the United States, Northern District of Illinois.

The separate answer of John G. Rogers to a Bill in Chancery, filed by Nathan Powell against Henry H. Walker and others.

This respondent says that he has no knowledge of the matters and things set forth in said bill, except as he is informed thereof by said bill, and that he has no knowledge of any claim, or right, title, or interest which he may have in and to the land described in said bill, and upon which the complainant asserts title or lien. But he supposes that he may be a trustee or successor in trust in some deed or deeds made by some owner or claimant of said land, for the use and benefit of some other person or persons; and if so, he leaves the *cestui que trust* to assert his or their rights. He has no knowledge of such trust; has never been advised thereof, so far as he knows or believes, and has never accepted it.

He reserves the right, and prays the Court to permit him, if necessary, to make further answer to said bill, when he is better informed and advised in the premises.

And now, having answered as fully as he is able to do, prays the Court to protect the rights of any person who may be interested in the premises through him, and to save him from all costs, &c.

JNO. G. ROGERS, *Pro se.*

(Endorsed:)
Filed Sept. 5th, 1874.
WM. H. BRADLEY, *Cl'k.*

And on the —— day, to wit, the 30th day of October, A. D. 1874, said defendants, Elias Greenebaum and Gerhard Foreman, by their solicitors, filed in said clerk's office their answer in said entitled cause, which said answer is in the words and figures following, to wit:

*Answer of Greenebaum & Foreman.*

UNITED STATES OF AMERICA, }
Northern District of Illinois, } ss.

Circuit Court of the United States, for the Northern District of Illinois.

NATHAN POWELL
*v.*
HENRY H. WALKER, FRANCIS A. HOFFMAN, JOHN BRENNOCK, BRIAN PHILPOT, ET AL. } In Chancery.

The answer of Elias Greenebaum and Gerhart Foreman, two of the defendants above named, to the Bill of Complaint filed herein by said Nathan Powell.

These defendants, saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in said bill contained, for answer thereunto, say:

That on the first day of October, A. D. 1870, said Samuel J. Walker, being the owner of block sixteen (16), in Packer's subdivision of the northeast quarter of the southwest quarter of section five (5) aforesaid, made, executed and delivered, unto one Henry E. Pickett, a warrantee deed, whereby he conveyed said block sixteen (16) unto the said Pickett, which said deed was filed for record in the recorder's office of Cook county, Illinois, on the 5th day of October, A. D. 1870.

That on the same day said Pickett, in order to secure a portion of the purchase money aforesaid, executed and delivered unto one Bacon Wheeler, a trust deed of said premises, to secure such indebtedness as remains due and unpaid, but how much still remains due these defendants are unable to state, but ask that the same may be determined upon the hearing of this cause.

That on the 26th day of February, A. D. 1874, said Samuel J. Walker entered into an agreement to sell unto one Emerson G. Orvis, the south one hundred feet of said block sixteen (16), which agreement was filed for record in the recorder's office of Cook county, Illinois, on the 26th day of February, A. D. 1874, and that said Samuel J. Walker subsequently conveyed said premises unto Henry H. Walker, and that said Henry H. Walker, by warrantee deed, conveyed the same unto the said defendant, Emerson G. Orvis; that on the 26th day of February, A. D. 1874, said Emerson G. Orvis executed a certain promissory note, of which the following is a copy, viz:

$4,000.00. CHICAGO, February 26th, 1874.

One year after date I promise to pay to my own order, four thousand dollars, value received, with interest at the rate of eight (8) per cent. per annum, payable annually; payable at the office of Greenebaum and Foreman, Chicago.

[Signed:] EMERSON G. ORVIS.

And in order to secure the same, executed and delivered unto said

Elias Greenebaum, a trust deed, whereby he conveyed the south one hundred feet of said block sixteen (16) unto him, the said Elias Greenebaum, for the purposes aforesaid, which deed was duly executed and acknowledged, and was, on the 9th day of April, A. D. 1874, filed for record in the recorder's office of Cook county, Illinois, and that afterwards the said note was endorsed by said Emerson G. Orvis, and was delivered unto said Samuel J. Walker for a full and valuable consideration; and that afterwards said Samuel J. Walker became indebted unto these defendants, Elias Greenebaum and Gerhard Foreman, doing business under the firm name of Greenebaum and Foreman, and being so indebted, he, the said Walker, pledged the said note, with the trust deed securing the same, as aforesaid, unto these defendants, and the same has ever since remained in their possession as a pledge or security for all the indebtedness of said Samuel J. Walker unto them.

And they further aver, that the indebtedness of said Samuel J. Walker unto them is much greater than the amount of said promissory note; and they further aver, that since the execution of said Powell mortgage and its record as aforesaid, he, the said Samuel J. Walker, became the owner of the entire tract of land so conveyed with said mortgage, and that the following portion of said tract has been sold and conveyed by said Samuel J. Walker, subsequent to the execution and delivery and filing for record of the said trust deed to said Bacon Wheeler, and subsequent to the execution and filing for record of the said trust deed of said Orvis unto said defendant Greenebaum, viz: Lots thirteen (13), fourteen (14), fifteen (15), seventeen (17), and eighteen (18), in said Packer's subdivision; and these defendants ask that in case a sale should become necessary of any portion of said premises, for the purpose of paying and satisfying the said Powell mortgage, that the same may be sold in the inverse order of that in which the said Samuel J. Walker conveyed the same, and that the premises so pledged to secure the indebtedness so evidenced by said Orvis' note may not be sold if the other premises before mentioned shall be requisite for the paying and satisfying of the indebtedness due upon the said Powell mortgage, and that said indebtedness may be marshalled in accordance with the principles of equity.

And these defendants having now fully answered, pray to be hence dismissed, &c.

ELIAS GREENEBAUM and
GERHARD FOREMAN.
By ROSENTHAL & PENCE,
*Their Solicitors.*

A. M. PENCE,
*Of Counsel.*

(Endorsed:)

Filed Oct. 30, 1874.
WM. H. BRADLEY, *Clk.*

On the —— day, to wit: the 2nd day of November, A. D. 1874, said defendant, Sherman A. Ricker, by his solicitors, filed in said clerk's office his answer in said entitled cause, which said answer is in the words and figures following, to wit:

*Answer of Sherman A. Ricker.*

UNITED STATES OF AMERICA,
Northern District of Illinois.

In the Circuit in and for said Northern District.

NATHAN POWELL
*vs.*
HENRY H. WALKER, SHERMAN A. RICKER & ALS. } In Chancery.

The answer of Sherman A. Ricker, one of the defendants in the above entitled cause.

This defendant, saving, reserving, &c., answering, says: that he is ignorant of all and every the matters and things in complainant's said Bill of Complaint set forth touching the execution and delivery of the mortgage deed and the note secured thereby by said Henry H. Walker and Samuel J. Walker to said complainant, and of the amount of money if any, now due from said mortgagors, Henry H. and Samuel J. Walker, to said complainant, either as principal or interest, and as to each and every the said matters this defendant calls for strict proof.

This respondent further answering, says: that on or about the first day of July A. D. 1872, the said Samuel J. Walker and Amanda M. Walker his wife, conveyed to William F. Coolbaugh and Heman G. Powers a portion of the premises in said Bill of Complaint described, to wit: Blocks thirteen (13), fourteen (14), sixteen (16), eighteen (18), and the south one hundred and eighty-one 25-100 feet of block in the south half of the northeast quarter of the southwest quarter of section number five (5), in township number thirty-eight (38) north, range fourteen (14), east of 3d principal meridian, all of which said blocks the said Coolbaugh and the said Powers now hold and claim under and by virtue of said deed of conveyance, as this defendant is informed and believes, excepting block fourteen (14), now held and owned by this defendant.

This respondent further answering, says: that on or about the day of February, A. D. 1873, he purchased said block fourteen (14), taking as evidence of title thereto a warranty deed from said Samuel J. Walker and wife, and a quit-claim deed from said Coolbaugh and wife and said Powers and wife. That at the time of so taking his said deed, he was informed by said Walker, and verily believed, that the title to same was free and clear, and had no intimation to the contrary until the service of the bill herein upon him.

This defendant further answering, says: that since the service of said bill of complaint upon him, he has made inquiries respecting the title to said premises in said bill described, and finds that the mortgage aforesaid originally covered the entire south half of the

N. E. ¼ of the S. W. ¼ of said section five, but that on the day of , A. D. 187–, the said Nathan Powell released the north half of said south half of the N. E. ¼ of the S. W. ¼ of said section five (5); and this defendant says, that much of said property so covered by said mortgage has changed hands and ownership since said mortgage was placed upon it.

That said property has raised in value to a large extent within the last few years. That this defendant is informed and believes that said Samuel J. Walker still holds an interest in a large portion of said premises, but of what proportion and what value, this defendant is ignorant.

Defendant further answering, says: that since the purchase of said block fourteen (14), he has erected on said block a packing house, at a cost of between eighty and eighty-five thousand dollars. That previous to purchasing said block, an abstract of title to same was furnished him by said Samuel J. Walker, and that he, this defendant, caused the same to be examined by skilled attorneys, who pronounced the title to same good in said Coolbaugh & Powers, from whom he purchased; and this defendant says, that if it be indeed true that said block fourteen (14) is included in the premises covered by said mortgage of said complainant, then that such portion of said property as said S. J. Walker is still interested in should be made to respond said mortgage, and not the premises of this defendant.

And this defendant further answering, says: that the mortgage aforesaid in said Bill of Complaint described, covers blocks other than that so purchased by this defendant, and that as aforesaid, transfers have taken place from time to time, and this defendant is unable now to state who have or claim to have an interest in said mortgaged premises: and thereupon this defendant says that if said Sam'l J. Waker be found to have no interest in said premises, then the entire property covered by said mortgage should respond such sum as may be found due on said mortgage, and all parties interested in the mortgaged estate should be, if they have not already, been made parties to this suit, and the encumbrance aforesaid equitably divided among them in proportion to their respective interests, or in such other manner as may be agreeable to equity and the rights of the respective parties herein.

And this defendant further answering, says: that he is informed and believes, and on his belief alleges the fact to be, that the said Sam'l J. Walker claims some interest in block eighteen, in said south half of northeast quarter of northwest quarter of section five, and has within the past year made a contract of sale of the same to one Louisa M. Tillinghast, for the sum of about twelve thousand dollars, which sum has not as yet been paid, in whole or in part; and defendant claims and says that said sum should be decreed to be paid to complainant herein in payment and satisfaction *pro tanto* for said mortgage debt, should said block 18 be found to be the property of said Sm'l J. Walker. And having fully answered said Bill of Complaint, so far as he is advised it is material or necessary for him to

answer the same, he prays to be hence dismissed, with his reasonable costs and charges, in this behalf most wrongfully sustained.

SHERMAN A. RICKER.

(Endorsed:)
Filed Nov. 2d, 1874.
WM H. BRADLEY, *Cl'k.*

Afterwards, to-wit: on the 30th day of November, A. D. 1874, said defendants, Elias Greenebaum and Gerhard Foreman, filed in said clerk's office their amended answer in said entitled cause, which said amended answer is in the words and figures following, to-wit:

*Amended Answer of Greenebaum & Foreman.*

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss.

Circuit Court of the United States, for the Northern District of Illinois.

NATHAN POWELL
*v.*
HENRY H. WALKER, FRANCIS A. HOFFMAN, JOHN BRENNOCK, BRIAN PHILPOT ET AL. } In Chancery.

The amended answer of Elias Greenebaum and Gerhard Foreman, two of the defendants above named, to the Bill of Complaint filed herein by said Nathan Powell.

These defendants, saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in said bill contained, for answer thereunto say, they admit the execution of said Powell mortgage, but as to the amount due, they are not informed, and leave complainant to prove the same; and they further aver and show, that said Samuel J. Walker, being the owner by deed bearing date November 25th, 1872, conveyed unto one John D. Kinney, block sixteen (16), in Packer's subdivision of the northeast quarter of the southwest quarter of section five (5), aforesaid, described in said bill, which deed was duly filed for record on the 2nd day of December, A. D. 1872. That after the execution of said Powell mortgage, said blocks thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), were conveyed unto said Samuel J. Walker, by the legal owner thereof, and said Walker then and there covenanted to assume and pay off said mortgage.

That since the sale and conveyance of said block sixteen (16) unto said John D. Kinney, and the filing of said deed to him for record as aforesaid, said Samuel J. Walker has sold and conveyed said block fourteen (14) and eighteen (18), in said Packer's subdivision.

That said John D. Kinney being so the owner of block sixteen (16), and in order to secure a part of the purchase money therefor, executed his certain promissory note, bearing date November 25th, A. D. 1872, being for the sum of twelve thousand dollars ($12.000), due on or before three years after date, with interest at eight per cent.

per annum; and so being the owner of said block, in order to secure said purchase money, so evidenced by said note, executed his certain trust deed unto said John G. Rogers, a trustee, and thereby conveyed unto him, by such trust deed, said block sixteen (16), which said trust deed, being duly executed by said Kinney, was filed for record in the recorder's office of Cook county Illinois, on the 23rd day of October, A. D. 1873, and was recorded in said office in book 266 of records, at page 453.

That said note so secured by said trust deed, is now owned and held by these defendants, for a valuable consideration.

That they are entitled to have that portion of said premises so encumbered by said Powell mortgage, which was conveyed by said Samuel J. Walker, subsequent to the record of said deed, to John D. Kinney, first sold to satisfy said Powell mortgage, and that said block sixteen (16), should only be sold in case said Powell mortgage shall not be satisfied by the sale of the premises subsequently conveyed by said Walker.

That subsequent to the record of said Kinney trust deed, as aforesaid, the south one hundred (100) feet of said block sixteen (16) was released from the effect of said Kinney trust deed; but they aver that no part of the note so executed by said Kinney has ever been paid. And they further aver, that on the 24th day of February, A. D. 1874, said Emerson G. Orvis executed his certain promissory note of that date, being for the sum of four thousand dollars ($4,000), due one year after date, with interest at eight per cent. per annum, and that in order to secure the same, said Orvis, who was the owner of said south one hundred (100) feet under said Kinney, conveyed the same in trust unto said Elias Greenebaum, trustee, which said trust deed was filed for record in the recorder's office of Cook county, Illinois, on the 9th day of April, A. D. 1874; and that said Orvis did then and there endorse said notes so executed by him, and delivered the same unto these defendants as collateral security for said Kinney note.

And these defendants ask to be protected in the premises, and having now fully answered, they pray to be hence dismissed, &c.

ELIAS GREENEBAUM and
GERHARD FOREMAN,
by ROSENTHAL & PENCE,
*Their Sol'rs.*

ROSENTHAL & PENCE, *Sol'rs and of Counsel for said Defendants.*

I consent to filing hereof as amendment to the answer of Greenebaum and Foreman.

JUNIUS MULVEY, *Sol'r for Compl't.*

(Endorsed:)
Filed Nov. 30, 1874.
WM. H. BRADLEY, *Cl'k.*

And on, to wit, the 5th day of March, A. D. 1875, said defendant, Sherman A. Ricker, by his solicitors, filed his cross-bill in said entitled cause, which said cross-bill is in the words and figures following, to wit:

*Cross-bill of Sherman A. Ricker.*

In Circuit Court of the United States, Northern District of Illinois.
In Chancery.

NATHAN POWELL
*v.*
HENRY H. WALKER, SAMUEL J. WALKER an Philpot, Adeline M. Philpot, John Rogers, Bacon Wheeler, Francis A. Hoffman, Wm. F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brannock, —— Branch, Julius Rosenthal, Emerson G. Orvis, Mary E. Orvis, Elias Greenebaum, John Somes, William P. Frailing, William Flannagan, —— Flanagan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, Northwestern Fertilizing Company, Third National Bank of St. Louis, James Q. Mitchell, John J. Squire. } Bill.

Cross-bill of Sherman A. Ricker, one of the defendants in the above entitled cause.

To the Honorable the Judges of the Circuit Court of the United States in and for the Northern District of Illinois, in chancery sitting:

Your orator, Sherman A. Ricker, brings this, his cross-bill, in the above entitled cause, and respectfully represents unto your Honors that he is one of the defendants in the original Bill of Complaint filed in this cause. That the said original bill was brought to foreclose a mortgage on certain premises in said bill described. That said premises consist of blocks thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), of Packer's subdivision of the northeast one-quarter of the southwest one-quarter of section five (5), township thirty-eight (38), north of range fourteen (14), east of third (3d) principal meridian.

Your orator further represents unto your Honors, that on the fifth (5th) day of April, A. D. 1873, he purchased of Samuel J. Walker, and Amanda M. Walker, his wife, block fourteen (14), one of the above described blocks. That the said Powell, in his said Bill of Complaint, includes said block fourteen (14), as covered by his said mortgage, and the co-defendants of your orator in said Bill of Complaint are seeking to charge said block fourteen (14), so purchased by him, with the payment of the amount that may be found to be due on said mortgage.

Your orator further says, that before purchasing said block he caused the title to same to be examined by his lawyers, and was as-

sured that the same appeared from the abstract to be free from incumbrance, which he now finds not to have been the fact.

Your orator further shows unto your Honors, that it is claimed by his co-defendants that the abstract of title to said premises shows that the said conveyance to your orator was the last, or among the very last, of the conveyances made by said Walker of any portion of said premises, and must, for that reason be first charged with the payment of said mortgage debt; and your orator cannot deny that said abstract of title does substantially show such a state of the conveyances. But your orator thereupon shows unto your Honors, and says, that he is informed and believes, and on his belief states the fact to be, that since the said purchase by him of said block fourteen (14), the said Samuel J. Walker made a contract (which has never been recorded) with one Louisa M. Tillinghast, to sell to said Louisa M. Tillinghast one-half of block eighteen (18), of said Packer's subdivision, being parcel of said mortgaged premises, for a large sum of money, the exact amount of which your orator is unable to state, but believes to be in excess of eleven thousand dollars; and thereupon, your orator says, that after the making of said contract the said Louisa M. Tillinghast entered into possession of said premises and erected thereon a packing house, so-called, at an expense of upwards of eight thousand dollars.

Your orator further shows unto your Honors, that the contract price agreed to be paid for said one-half of said block eighteen (18), has never been paid to said Samuel J. Walker, but is still in the hands of Louisa M. Tillinghast, and should be charged with the payment of said mortgage debt before your orator's said property can be charged therewith.

Your orator says further, that he is informed and believes, and on his belief charges the fact to be, that at the time of the making of said contract last referred to, the record title to said one-half of block eighteen (18) was in the said defendants, Wm. F. Coolbaugh and Heman G. Powers, but that the said Coolbaugh and the said Powers, at the said time or subsequent thereto, agreed to convey and quit-claim all their interest in the same, at the request of said Walker, to the said Louisa M. Tillinghast; and your orator respectfully shows unto your Honors that said half of said block eighteen (18), (a particular description of which he is at this time unable to give) is first liable for the payment of said mortgage debt before the property of your orator can be charged therewith.

Your orator further shows unto your Honors, that he is informed and believes, and on his belief states the fact to be, that there is in the hands of Robert Hervey, Elliott Anthony and A. T. Galt, (constituting the firm of Hervey, Anthony & Galt), as attorneys of defendant, Wm. Flannigan, a large sum of money, proceeds of the sale of some portion of the said mortgaged property, or promissory notes representing the same, which money or notes are claimed by said Samuel J. Walker, and which are also chargeable with, and should be applied to, the payment of the said mortgage debt before the said property of your orator can be legally charged therewith; but your orator is unable to give the amount of money or promissory notes so

*Cross-bill of Sherman A. Ricker.*

In Circuit Court of the United States, Northern District of Illinois.
In Chancery.

NATHAN POWELL
*v.*
HENRY H. WALKER, SAMUEL J. WALKER an Philpot, Adeline M. Philpot, John Rogers, Bacon Wheeler, Francis A. Hoffman, Wm. F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brannock, —— Branch, Julius Rosenthal, Emerson G. Orvis, Mary E. Orvis, Elias Greenebaum, John Somes, William P. Frailing, William Flannagan, —— Flanagan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, Northwestern Fertilizing Company, Third National Bank of St. Louis, James Q. Mitchell, John J. Squire. } Bill.

Cross-bill of Sherman A. Ricker, one of the defendants in the above entitled cause.

To the Honorable the Judges of the Circuit Court of the United States in and for the Northern District of Illinois, in chancery sitting:

Your orator, Sherman A. Ricker, brings this, his cross-bill, in the above entitled cause, and respectfully represents unto your Honors that he is one of the defendants in the original Bill of Complaint filed in this cause. That the said original bill was brought to foreclose a mortgage on certain premises in said bill described. That said premises consist of blocks thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), of Packer's subdivision of the northeast one-quarter of the southwest one-quarter of section five (5), township thirty-eight (38), north of range fourteen (14), east of third (3d) principal meridian.

Your orator further represents unto your Honors, that on the fifth (5th) day of April, A. D. 1873, he purchased of Samuel J. Walker, and Amanda M. Walker, his wife, block fourteen (14), one of the above described blocks. That the said Powell, in his said Bill of Complaint, includes said block fourteen (14), as covered by his said mortgage, and the co-defendants of your orator in said Bill of Complaint are seeking to charge said block fourteen (14), so purchased by him, with the payment of the amount that may be found to be due on said mortgage.

Your orator further says, that before purchasing said block he caused the title to same to be examined by his lawyers, and was as-

sured that the same appeared from the abstract to be free from incumbrance, which he now finds not to have been the fact.

Your orator further shows unto your Honors, that it is claimed by his co-defendants that the abstract of title to said premises shows that the said conveyance to your orator was the last, or among the very last, of the conveyances made by said Walker of any portion of said premises, and must, for that reason be first charged with the payment of said mortgage debt; and your orator cannot deny that said abstract of title does substantially show such a state of the conveyances. But your orator thereupon shows unto your Honors, and says, that he is informed and believes, and on his belief states the fact to be, that since the said purchase by him of said block fourteen (14), the said Samuel J. Walker made a contract (which has never been recorded) with one Louisa M. Tillinghast, to sell to said Louisa M. Tillinghast one-half of block eighteen (18), of said Packer's subdivision, being parcel of said mortgaged premises, for a large sum of money, the exact amount of which your orator is unable to state, but believes to be in excess of eleven thousand dollars; and thereupon, your orator says, that after the making of said contract the said Louisa M. Tillinghast entered into possession of said premises and erected thereon a packing house, so-called, at an expense of upwards of eight thousand dollars.

Your orator further shows unto your Honors, that the contract price agreed to be paid for said one-half of said block eighteen (18), has never been paid to said Samuel J. Walker, but is still in the hands of Louisa M. Tillinghast, and should be charged with the payment of said mortgage debt before your orator's said property can be charged therewith.

Your orator says further, that he is informed and believes, and on his belief charges the fact to be, that at the time of the making of said contract last referred to, the record title to said one-half of block eighteen (18) was in the said defendants, Wm. F. Coolbaugh and Heman G. Powers, but that the said Coolbaugh and the said Powers, at the said time or subsequent thereto, agreed to convey and quit-claim all their interest in the same, at the request of said Walker, to the said Louisa M. Tillinghast; and your orator respectfully shows unto your Honors that said half of said block eighteen (18), (a particular description of which he is at this time unable to give) is first liable for the payment of said mortgage debt before the property of your orator can be charged therewith.

Your orator further shows unto your Honors, that he is informed and believes, and on his belief states the fact to be, that there is in the hands of Robert Hervey, Elliott Anthony and A. T. Galt, (constituting the firm of Hervey, Anthony & Galt), as attorneys of defendant, Wm. Flannigan, a large sum of money, proceeds of the sale of some portion of the said mortgaged property, or promissory notes representing the same, which money or notes are claimed by said Samuel J. Walker, and which are also chargeable with, and should be applied to, the payment of the said mortgage debt before the said property of your orator can be legally charged therewith; but your orator is unable to give the amount of money or promissory notes so

in the hands of said Hervey, Anthony & Galt, or to give more particularly the facts relating thereto.

Your orator also shows unto your Honors, that Daniel L. Boone, father of said Louisa M. Tillinghast, claims to have some interest in the premises the nature of which your orator cannot fully state, and your orator says that the facts hereinbefore stated, have only recently, and after filing his answer herein, come to his knowledge.

To the end, therefore, that equity be done, and that your orator may have that relief which he can only obtain in a court of equity, your orator prays that a writ of subpœna issue out of and under the seal of this Honorable Court, directed to the said Louisa M. Tillinghast, Robert Hervey, Elliott Anthony, A. T. Galt and Daniel L. Boone, commanding them, and each of them, to be and appear before this Honorable Court at a certain time and under a certain penalty to be therein limited, full, true and perfect answer to make to all and several the allegations in this Cross-bill contained, but not upon oath (their oath and that of each of them being waived according to statute), and further to stand to, abide and perform the decree of this Honorable Court herein.

And that by the decree of this Honorable Court, the said premises so sold to said Louisa M. Tillinghast, and the said money or promissory notes in the hands of said Hervey, Anthony & Galt, may be adjudged and decreed to be first liable for the payment of said mortgage debt, or what may be found to be due thereon; and that your orator's said property may be held not to be first liable for the same; and for such other and further relief as to the Court may seem meet, and as in duty bound will ever pray.

SHERMAN A. RICKER.

By his Solicitors, FULLER & SMITH

FULLER & SMITH, *Counsel.*

(Endorsed:)

Filed March 5, 1875.

WM. H. BRADLEY, *Cl'k.*

Afterwards, to wit: on the 27th day of March, A. D. 1875, said Henry W. Bishop, Esq., Master in Chancery, to whom said cause was referred, filed in said clerk's office his report in said entitled cause, which said report is in the words and figures following, to wit:

*Master's Report.*

In the Circuit Court of the United States, for the Northern District of Illinois. In Chancery.

NATHAN POWELL,
*Complainant,*
*vs.*
HENRY H. WALKER, SAMUEL J. WALKER, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brannock, Brannock, Julius Rosenthal, Emerson G. Orvis, Elias Greenebaum, Mary E. Orvis, John Somes, William P. Frailey, William Flanagan, Flanagan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, The Northwestern Fertilizing Company, The Third National Bank of Saint Louis, James Q. Minschall, and John P. Squire,
*Defendants.*
} Original Bill.

And cross-bill of Sherman A. Ricker, one of the defendants in the above-entitled cause.

*Master's Report.*

*To the Honorable Judges of said Court:*

The above cause having been referred to me as Master in Chancery in said Court, by an order of said Court dated the fifth (5th) of November, in the year of our Lord one thousand eight hundred and seventy-four (A. D. 1874), to take proofs and report the same to the Court, under the original bill herein, and by an order of said Court to take proofs and report the same to the Court under the said cross-bill herein, I do hereby report that, having given notice to the parties interested that a hearing therein for the purposes in said order expressed, would be had before me at my office, number 25 Republic Life building, LaSalle street, Chicago, on Monday, the sixteenth (16th) day of November, then instant (being in the year 1874), at two (2) o'clock P. M., I was attended on said day by Junius Mulvey, Esquire, solicitor for the complainant in the original bill, who produced in evidence before me all the papers filed in said cause, including the Bill of Complaint in the original bill herein, together with the promissory note and mortgage mentioned and set forth in the said original bill.

I further report, that from an examination of the said promissory note and mortgage, and from a computation of the amount due thereon, I find that there is due and owing from said defendants,

Henry H. Walker and Samuel J. Walker, to the said complainant in the original bill, the sum of twelve thousand dollars ($12,000), for the principal, and the sum of twenty-eight hundred and fifty-three dollars and thirty-three cents ($2,853.33) for interest thereon to the date of this report, making a total sum due and owing from said defendants Henry H. Walker and Samuel J. Walker, to said complainant in the original bill on the said promissory note and mortgage, of fourteen thousand eight hundred and fifty-three dollars and thirty-three cents ($14,853.33) for principal and interest to the date of this report.

I further report, that I was attended on Thursday, the nineteenth (19th) day of November, A. D. one thousand eight hundred and seventy-four (1874), by the said Junius Mulvey, and also by A. M. Pence, Esquire, of the firm of Rosenthal & Pence, of counsel for defendants Elias Greenebaum, the International Bank, Francis A. Hoffman, Gerhard Foreman, Levi Abt, John Brannock, Patrick Brannock and Julius Rosenthal.

The said A. M. Pence testified as a witness on behalf of said defendants Elias Greenebaum and Gerhard Foreman. His said testimony was duly taken, is hereto attached and forms a part hereof.

I was also attended on said last mentioned day, by Berthold Loewenthal, a witness on behalf of the International Bank, of Chicago, whose testimony was duly taken, is hereto attached, and forms a part hereof.

The hearing of further testimony herein, was then adjourned to Saturday, the twenty-first (21st) day of November, A. D. 1874 (eighteen hundred and seventy-four), on which day I was attended by Joseph E. Smith, Esquire, of the firm of Fuller & Smith, of counsel for defendants William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers and Sarah E. Powers, and Sherman A. Ricker.

The said Joseph E. Smith testified as a witness on behalf of defendants, William F. Coolbaugh and Heman G. Powers. His said testimony was duly taken, is hereto attached, and made a part hereof.

I was also attended on said last mentioned day by David Quigg, Esquire, of the firm of Bentley & Quigg, of counsel for defendants the Northwestern Fertilizing Company and Abner Taylor. I was also attended on said last mentioned day by the said defendant Henry H. Walker, who testified as a witness on behalf of said Northwestern Fertilizing Company. The testimony of the said Henry H. Walker was duly taken, is hereto attached, and forms a part hereof.

I was also attended, on said last mentioned day, by Robert W. Ralston, a witness on behalf of the said Northwestern Fertilizing Company, whose testimony was duly taken, is hereto attached, and forms a part hereof.

There was produced in evidence before me, an abstract title to the property mentioned in the mortgage to said complainant, in the original bill, as set out and described in the original bill herein; and the several solicitors appearing for the defendants herein, stipulated that the said abstract of title so offered in evidence as last aforesaid, truly represents the record of the different instruments thereby

shown, so far as purports the dates of filing the same, and that the same might be used as evidence in lieu of original documents, subject, however, to contradiction by any competent evidence.

The taking of testimony herein was then adjourned to Tuesday, the twenty-fourth (24) day of November, A. D. 1874 (eighteen hundred and seventy-four), on which day I was attended by Hugh Alexander, junior, Esquire, of counsel for defendants Emerson G. Orvis, Mary E. Orvis, John P. Squire, Elias Greenebaum, John Somes and William P. Frailey.

The testimony of said Hugh Alexander, junior, was duly taken, is hereto attached, and made a part hereof.

I was also attended on said last named day by said defendant, Samuel J. Walker, whose testimony was duly taken, is hereto attached and made a part hereof. I was also attended on said last mentioned day by said defendant, Elias Greenebaum, whose testimony was duly taken, is hereto attached and made a part hereof. I was also attended on said last mentioned day by said A. M. Pence, Esquire, who testified on behalf of said defendant, Patrick Brannock. His testimony was duly taken, is hereto attached and made a part hereof. I was also attended on said last mentioned day by William C. Grant, Esquire (of the firm of Grant & Swift), of counsel for C. S. Symonds and Daniel Pratt, assignees in bankruptcy of the People's Safe Deposit and Savings Institution, of the State of New York. The documents produced in evidence before me by said William C. Grant (being the answer of said C. S. Symonds and Daniel Pratt to said original bill of complaint herein; a promissory note from said defendant, Henry E. Picket, to said defendant, Samuel J. Walker; a deed of trust securing said last mentioned promissory note; another promissory note from said defendant, Henry E. Picket, to said defendant, Samuel J. Walker; another deed of trust, being a deed of trust for securing the payment of said last mentioned promissory note; a certified copy of the appointment of said Daniel Pratt and C. S. Symonds as assignees of the said People's Safe Deposit and Savings Institution; and a certified assignment of the estate of said People's Safe Deposit and Savings Institution) are hereto annexed, and made a part hereof, being marked, respectively, Exhibits F, G, H, I, J, K, and L.

I further report, that I was attended on Saturday, the sixth (6th( day of March, A. D. 1875 (eighteen hundred and seventy-five), by the said Joseph E. Smith, Esquire, of the firm of Fuller & Smith, of counsel for the said Sherman A. Ricker, under the said cross-bill filed by the said Sherman A. Ricker, and also by Robert Hervey, a witness on behalf of the said Sherman A. Ricker, whose testimony was duly taken, is hereto attached and made a part hereof.

I was also attended on said last named day by Daniel L. Boone, and other witnesses on behalf of the said Sherman A. Ricker under the said cross-bill. The testimony of the said Daniel L. Boone was duly taken, is hereto attached and made a part hereof.

I further report, that from an examination of the abstract of title so produced as aforesaid, I find that on the thirtieth (30th) day of September, 1870 (eighteen hundred and seventy), there was recorded

in the recorder's office of Cook county, Illinois, in book 172 of maps, page 25, a plat of a subdivision of the property included in the mortgage to the said complainant in the original bill, which plat was entitled "Packer's subdivision of the N. E. ¼ of the S. W. ¼ of Sec. 5, T. 38, R. 14."

And I further report, that from an examination of the said abstract of title so produced as aforesaid, and from the testimony of the several witnesses who have appeared before me herein, I find that the equities of the said defendants in the original bill herein are such that the property included in the said mortgage to complainant in the said original bill, which still remains as a security thereunder, and which has not been released, should be offered for sale in the following manner, to wit:

*First*—The north two hundred and one (201) feet of block sixteen (16), of Packer's subdivision of the northeast quarter of the southwest quarter of section five (5), township thirty-eight (38) north, range fourteen, east of the third principal meridian; and if the amount realized on said sale shall be insufficient to pay and satisfy the total amount due and owing to said complainant in the original bill, then should be offered for sale:

*Second*—The south one hundred (100) feet of the said block sixteen (16); and if the amount realized on said sale shall be insufficient to pay and satisfy the total amount due and owing to the said complainant in the original bill, then should be offered for sale:

*Third*—Block fourteen (14) of the said Packer's subdivision; and if the amount realized on said sale shall be insufficient to pay and satisfy the total amount due and owing to said complainant in the original bill, then should be offered for sale:

*Fourth*—Blocks thirteen (13) and eighteen (18), of the said Packer's subdivision; and if the amount realized on said sale shall be insufficient to pay and satisfy the total amount due and owing to the said complainant in the original bill, then should be offered for sale:

*Fifth*—Block fifteen (15), of the said Packer's subdivision; and if the amount realized on said sale shall be insufficient to pay and satisfy the total amount due and owing to the said complainant in the original bill, then should be offered for sale, block seventeen (17) in said Packer's subdivision.

The cross-bill of Sherman A. Ricker aforesaid having also been referred to me to take proofs and report the same, I do hereby report, that it appears from the testimony hereto attached, taken thereunder, that there was a contract for sale to Louisa M. Tillinghast of the south half of Block eighteen (18) which said contract was dated the third (3rd) September 1874, (the same not appearing of record, for the sum of eleven thousand five hundred and ninety-three dollars and forty-one cents ($11593.41), and that it would appear (if the same had been duly recorded) that the said premises were first liable to be sold for the payment of said mortgage indebtedness to the complainant in said original bill.

I also report that there is in the hands of Robert Hervey, Esquire, certain securities, proceeds of a sale of a portion of the premises covered by said mortgage held in escrow by said Robert Hervey, and

not to be delivered till the said portion, to wit: block sixteen (16) in the said Packer's subdivision, be freed from all encumbrance; and it would also appear from the said testimony that said Walker's interest in said securities should also be sold, and the proceeds applied to the extinguishment of the said mortgage indebtedness, before resort be had to the sale of any portion of the premises covered by the said mortgage.

The whole of which is respectfully submitted.

Dated Chicago, March 17th, 1875.

HENRY W. BISHOP,
Master in Chancery of the Circuit Court of the United States,
for the Northern District of Illinois.

IN THE CIRCUIT COURT OF THE UNITED STATES,
for the Northern District of Illinois.

NATHAN POWELL,
*Complainant,*
*vs.*
HENRY H. WALKER, SAMUEL J. WALKER AND OTHERS,
*Defendants.*

In Chancery.

Testimony taken before Henry W. Bishop, Master in Chancery of said Court, Thursday, November 19th, 1874. Present, Mr. Pence, of counsel for the defendant, and Junius Mulvey, of counsel for complainant.

*Testimony of Berthold Loewenthal.*

* * * * * * * *

*Testimony of A. M. Pence.*

Int. 1. Please state your name, age, residence and occupation.

Ans. A. M. Pence; of full age; Chicago; attorney at law.

I have in my possession one note of $12,000, executed by J. D. Kinney, and dated Nov. 25th, 1872, and due on or before 3 years after date, which note is secured by a trust deed of even date, executed by John D. Kinney, and running to John G. Rogers, trustee, which conveys block sixteen in said Packer's subdivision. Said trust deed was filed for record in the recorder's office of Cook county, Illinois, on the 23rd of October, 1873. A copy of the note is offered in evidence, and is marked as "Exhibit E."

The south 100 feet of said block 16 was afterwards released. Said note is the property of Greenebaum & Foreman, two of the defendants herein. At the time of the aforesaid release, Emerson G. Orvis, namely, on the 26th Feb'y, 1874, executed his note for $4,000, due 1 year after date, and, to secure same, executed trust deed to Elias Greenebaum, and thereby conveyed to him said south 100 feet in block 16. Said trust deed was filed for record in the recorder's office of Cook county, Illinois, on April 9th, 1874. The Orvis note is now held and owned by said defendants Greenebaum

& Foreman. I have the notes last described, and which are owned by Greenebaum & Foreman.

(Signed:) A. M. PENCE.

In the Circuit Court of the United States, for the Northern District of Illinois.

NATHAN POWELL, *Complainant*,
*v.*
HENRY H. WALKER ET AL., *Defendants*, } In Chancery.

Testimony taken before Henry W. Bishop, Master in Chancery of said court, on the 24th day of November, A. D. 1874, at 2 P. M.

Present, Mr. Mulvey, of counsel for complainant, and Messrs. Pence, Quigg and Alexander, of counsel for defendants.

*Testimony of Samuel J. Walker.*

Int. 1. Please state your name, age, residence and occupation.

Ans. Samuel J. Walker.

Q. I want to ask you in reference to the Bacon Wheeler mortgage, given upon block 16, in Packer's subdivision of the premises in question. Please state what you know about that. I see it is not released of record.

A. That is paid; was paid at maturity, or the day after.

Q. When was that?

A. That was just before the fire. I think it was about October 5th.

Q. Do you know why it was not released?

A. Yes, sir. I was under the impression at the time it was on block 17, and I had sold block 17, and supposed this mortgage was on that, and afterwards learned it was on 16, and then I tried to make the exchange; having sold block 17, and desiring to make the title good, I tried to make a change; consequently let the matter stand, and never called for a deed.

Q. Does Bacon Wheeler now refuse to execute a release to block 16? I have understood he refused to execute a lease of 16, for the reason that he did not know which one the trust deed was on.

A. Yes, sir; he has objected since the fire to making a release of the property; not being certain, or something of that sort.

Q. Was this released or paid—the indebtedness secured by the trust deed on block 16?—was it paid about the time that Greenebaum & Foreman purchased or took the Kinney trust deed?

A. No; long before.

Q. Through whom was it paid; through what bank?

A. The Prairie State bank.

Q. By whom was the note held?

A. It was held by some Eastern bank.

Q. What was done when the note was paid?

A. The note was taken up, and if it is not in my possession it may have been burned at the time of the fire; most of my papers were burned more or less.

Q. Is either burned or destroyed?

A. Yes, sir; I say if it is not in my possession it may have been burned.

*Cross-examination, by Mr. Quigg.*

Q. When did you sell block 17?

A. I don't remember the exact date; I can tell by reference to the abstract, probably.

Q. Was it about the date of the deed? The date of the deed was the second of October; was it before the fire?

A. Yes, sir; I don't recollect the date exactly; I think it was before the fire. I know it was about the time of the payment of this thing.

Q. I will ask you whether there was any encumbrance on block 17, and if there was another trust deed to Bacon Wheeler?

A. There was.

Q. Now I will ask you which indebtedness you intended to pay, whether upon block 16 or upon block 17?

A. I intended and thought I was paying on block 17.

Q. You intended the money to be appropriated for the payment of the indebtedness on block 17?

A. Yes, sir.

Q. Was anything said by you at the time this money was paid?

A. I don't recollect; I think the note was first taken up, probably at the time.

Q. I will ask you in regard to these notes; how many notes were there outstanding of the same date and the same amount?

A. Three of $7,500 each, on 16, 17 and 18.

Q. Each secured by a deed of trust to Bacon Wheeler?

A. Whether they were separate deeds or one deed of trust, I do not now recollect.

Q. There were separate deeds of trust on each block; what was your object in paying on block 17?

A. I had sold it, and wanted to give Mr.—

Q. And you proposed to pay that up?

A. Yes, sir; and thought I was paying that up.

Q. I will ask you if you made any effort afterwards to have the money appropriated or to procure a release of block 17?

A. I did; to make the change—I wanted to substitute one for the other.

Q. That is, you wanted the money applied where you intended it should go in the first place?

A. Yes sir: I had not sold block 16, and of course selling 17, I wanted to clear it up, and had I not supposed that this note was on block 17, I certainly should have paid the note that was on that, and left that out instead of block 16.

*Re-direct Examination, by Mr. Pence.*

Q. I understand you that as a matter of fact you paid on 16?

A. I paid a note secured on 16, but supposed at the time I was paying it on 17.

Q. You so informed Greenebaum and Foreman it was paid on 16, at the time you took the Kinney trust deed?

A. That was long afterwards, when I found I could not make the change. The payment really was on 16; that is, the note paid was secured on 16.

*Re-cross examination, by Mr. Quigg.*

Q. Do you remember who the maker of that note was?

A. I think it was Mr. Pickett.

Q. Henry E. Pickett?

A. Yes, sir.

*Cross-examination, by Mr. Alexander.*

Q. You made a sale to William Flannagan, did you not, of some property in Packer's subdivision?

A. Yes, sir.

Q. What proportion, and what block?

A. I think it was the north two hundred feet of block 16.

Q. What was the consideration of the purchase money?

A. I am not certain whether it was fifteen or sixteen thousand dollars: thereabouts.

Q. Any part of it paid down?

A. Yes, sir.

Q. Is there any part of that purchase money, either in cash or in notes, still in Flannagan's hands, due you?

A. In his attorney's hands?

Q. Hervey, Anthony and Gault?

A. Yes, sir; Mr. Hervey.

Q. What amount, either in notes or money? and specify the amount of each, if both.

A. I don't recollect the exact amount. The notes I think are in the neighborhood of nine thousand dollars.

Q. Is there any cash?

A. I don't recollect just now whether there is or not; there is a certain amount of paper left there, for the purpose of being used in perfecting the title, clearing it up.

Q. What particular defects was the paper held by Flannagan's attorney to cure?

A. Until the balance of the Powell mortgage was off, and I think part of the Kinney note.

Q. Do you know how those notes were drawn? To whose order and for what time?

A. I think they were drawn to Henry H. Walker. I think they went through him to Mr. Flannagan.

Q. Due about when?

A. Well, I have forgotten exactly; probably one and two years.

Q. I see your deed to Flannagan is of record?

A. Yes, sir.

Q. Were these securities in the hands of Hervey, Anthony & Gault deposited there as an escrow?

A. Yes, sir; left there for the purpose of perfecting the title; that is, the removal of these encumbrances.

Q. What blocks compose the south half of the Packer subdivision which is still subject to this Powell mortgage?

A. 16, 17 and 18, and 10, 11, 12 and 13.

Q. Refresh your recollection from that plat.

(Plat shown to witness.)

A. 13, 14, 15, 16, 17 and 18.

Q. Now, will you state what portion, if any, of those blocks remain unsold, and the title either in Henry H. Walker or yourself?

A. There is not any title to either of them in myself or brother.

Q. Neither in you or Henry H.?

A. No, sir. Mr. Coolbaugh holds the title, I think.

Q. What portions of those blocks still subject to the Powell lien are held by any person other than Henry H. or Samuel J. Walker in trust for or for the benefit of either of the Walkers?

A. I suppose you consider the property held by Mr. Coolbaugh in trust for myself. I did make a sale of this property at one time, the property named there, to Mr. Coolbaugh and Powers, and afterwards canceled the sale, or agreed to take it back and let them hold the title for the money advanced by them, if any money was due to them, if there was anything due Mr. Coolbaugh or the bank.

Q. At the present time is there anything due Mr. Coolbaugh for which he should hold that as a security?

A. Yes, sir.

Q. About how much?

A. I don't recollect the amount.

Q. Give an approximate amount.

A. Well, it would be more than enough to cover any margin in them, over and above the encumbrances on them. The conveyance of Coolbaugh and Powers was recorded after the conveyance of 16 and 17.

Q. Then there is none of these six blocks held by Henry H. or Samuel J. Walker?

A. No, sir.

*Re-cross examination*, by MR. QUIGG.

Q. I will ask you about these Pickett trust-deeds; were those *bona fide* incumbrances?

A. Yes, sir; sold outright.

Q. None of those have ever been paid, except lot 16 or 17?

A. I don't know but there has; I am not certain about that. There is some I intended to pay. I don't know exactly.

Q. How much did you pay?

A. I paid him some considerable amount of money in taking up incumbrances, and any surplus I intended to apply on this.

Q. How much have you paid on this indebtedness on these blocks 16, 17 and 18?

A. I have only paid off entirely one.

Q. You say you have applied surplus, from time to time, from other transactions, on this indebtedness; how much have you paid?

A. That was small; I don't know exactly.

Q. Have you paid any amount which would apply on blocks 16, 17 or 18?

A. I intended, if there was any surplus out of certain things, to have it apply on 17.

Q. I am asking whether there has been any surplus?

A. I cannot say; I have not had the amount made up.

Q. You don't know how it stands?

A. I don't know exactly how it stands.

Q. Have you paid any moneys to Mr. Grant out of which would arise a surplus to be applied somewhere?

A. I have made him some payments out of which I supposed there was some surplus, which I intended would go to this.

Q. Which?

A. Block 17.

Q. But you don't know whether there is, as a matter of fact?

A. No, sir.

Q. Have you had any settlement with Mr. Grant, in any way, to determine what is due?

A. No; I have not had a full settlement with Mr. Grant; I have been intending to pay him some more money on this.

Q. Have you had any talks with Mr. Grant recently about this incumbrance?

A. Well, simply that I said to Mr. Grant recently, that I expected to pay him some money soon on some of these incumbrances, intending it, of course, to be on block 17.

Q. He has blocks 17 and 18?

A. Yes, sir.

By Mr. Pence.

Q. Does he have the notes secured on 17 and 18?

A. I understand so.

Q. Was he represented the owner of the indebtedness, or the owner of the incumbrance on block 16 at the time it was paid?

A. No, sir.

Q. He had nothing to do with that?

A. He has nothing to do with that; that was paid to the bank that held it, I think, before it went into liquidation.

Q. How did it happen that you paid a note for $7,500, secured by a deed of trust, and did not take any release?

A. Well, it is customary to pay, and then apply to the trustee for a release.

Q. Isn't it customary here, where paper is sent on for collection, to deposit the release and the note in the bank?

A. Often done; yes, sir; but the trustee being here, we often pay, and go to the trustee afterwards.

Q. Did you make any application to the trustee to release either block 16 or 17 immediately after the payment of this note?

A. I did not immediately; I discovered my mistake and tried to make the exchange.

Q. Did you apply to the trustee to release block 17 immediately after the payment of this note?

A. Of course not, because the note I had taken was on block 16; of course I could not apply to him.

Q. I will ask you if you made any statements to Rawson, about the time of the purchase of this block, in regard to an incumbrance on block 17?

A. I told Mr. Rawson about this incumbrance, and I either told him that I had paid, or had provided for the payment to be made of this $7,500.

Q. Didn't you tell Rawson that you had paid it—or rather, didn't you tell Rawson that there were no incumbrances on this property?

A. No; this thing was spoken of; I told him it was either provided for, or had been paid, and was paid about that time.

Q. Are you certain anything was said about any incumbrances on block 17?

A. I think Rawson and I talked about the $7,500.

Q. Have you any recollection whether anything was said in regard to incumbrances on block 17 at the time of the purchase by Rawson, and was n't it represented that there were no incumbrances upon it?

A. I represented to Mr. Rawson—I was under the impression—I intended to pay that block 17 instead of 16, and supposed I had done it.

Q. Then if you made any statements in regard to it, it was on the supposition that the money had been applied to the payment of the indebtedness on block 17?

A. I did afterwards tell him the incumbrance was off. I was under the impression it had been paid. I was under the impression when this was paid, that it was on 17 and 16, and therefore never have taken a release.

*Re-cross Examination, by Mr. Alexander.*

Q. Do you remember the contract of Henry H. and Samuel J. Walker with Emerson Orvis for the south one hundred feet of 16?

A. Yes, sir.

Q. Do you know whether or not you stated to him, through his attorney, that the Bacon Wheeler trust deed on 16 was paid?

A. Yes, sir.

Q. And whether you stated to him or his attorney that if they demanded, probably Mr. Wheeler would release them, or what instructions you gave either of them about seeing Bacon Wheeler about releasing?

A. I stated it had been paid, and I think at that time I went for a release myself—about that time.

Q. Have you seen the remaining two notes, for $7,500 each, that Mr. Grant has? Have you seen them lately?

A. No, sir.

*Re-direct Examination, by Mr. Pence.*

Q. Were all three of the notes in the bank you refer to—the Prairie State Savings, Loan and Trust Company?
A. I think not; I think one was sent out and interest paid on the others.
Q. And that was the note secured on block 16, as it turned out to be?
A. It turned out to be block 16.
Q. That was the only note that was there at the time?
A. That is my recollection.
Q. Did the three notes which were secured upon blocks 16, 17 and 18, respectively, by trust deed, fall due at the same time, or different times?
A. Different times.
Q. And the notes secured by block 16 fell due first, according to your recollection?
A. That is my recollection.
Q. The trust deeds were given in 1870, and a year afterwards, in October 1871, the note secured by block 16 was paid?
A. Yes, sir; a day or two afterwards, probably; I think it was on the 4th or 5th.

*Re-cross Examination, by Mr. Alexander.*

Q. Was it due when paid?
A. Yes, sir.
Q. The other two are not due?
A. No, sir.
Q. Are you acquainted with Lucy M. Tillinghast?
A. I have met the lady; I cannot say that I am.
Q. Have you ever sold her any property, if so what?
A. I have sold her husband some for her; the south half of lot 18.
Q. Did you ever convey it?
A. No, sir, I did not.
Q. Did you make a contract?
A. I made a contract; yes, sir.
Q. Is it of record?
A. Not to my knowledge.
Q. What part of 18 did you sell her—what consideration?
A. It was the south half, I think—the south 165 feet or south half.
Q. What was the amount of the purchase money?
A. I think it was $11,500.
Q. Any of it paid down; if so, how much?
A. No sir, nothing paid down.
Q. Anything paid since the execution of the contract?
A. No, sir; I think not.
Q. Nothing paid on that?
A. Nothing been paid on that at all.
Q. Who has been in possession since the making of the contract?
A. They have.

Q. Made any improvements?
A. Yes, sir.
Q. About what?
A. I understand seven or eight or ten thousand dollars' worth; something like that.
Q. When was that sale made?
A. About a year ago, a little more or less.
Q. Let me refresh your recollection: wasn't it on or about the 9th day of February, 1874, not quite a year ago?
A. I said a year ago; may be a little more or less.
Q. Then you have not received the purchase money, amounting to about $11500?
A. No, sir, or a portion of it.
Q. Is it in anybody's hands for you; if so, in whose?
A. Is what in anybody's hands?
Q. The purchase money.
A. They are only to make about fifteen hundred dollars cash payment, I think: the balance on five years' time, I think; three or five years.
Q. Did you hold any securities for that money, executed by Mr. Tillinghast or Mrs. Tillinghast?
A. No, sir; no further than the improvements may be considered as security.
Q. You sold it on five years' time?
A. The bulk of it, I think, either three or five years.
Q. You have not got their note for the money?
A. No, sir.
Q. Anybody else got it for you in escrow?
A. No, sir; not to my knowledge. I closed up the sale on account of this Powell matter.
Q. And the payment and giving your deed and receiving the security was conditional on the settlement of this Powell matter?
A. Clearing the title; yes sir. There is also an incumbrance of $7.500 on the whole block.
Q. To Wheeler?
A. This Pickett matter; yes, sir.
Q. Who transacted this business between you and the Tillinghasts in this purchase; anybody but the Tillinghasts?
A. Probably Mr. Peck introduced him.
Q. The lawyer?
A. No, sir; the real estate man; it is something that was done partially through him.
Q. What is Mr. Tillinghast's full name?
A. I don't recollect.
Q. Of whom did you purchase the property that you afterwards called Packer's subdivision, prior to your subdivision?
A. Of Powell.
Q. Didn't you purchase from Henry H. Walker?
A. I think I did purchase through Henry H. Walker the forty acres; yes, sir; that was the case.

*Re-direct Examination by Mr. Pence.*

Q. When Henry H. Walker conveyed the premises to you by a quit-claim deed, did you assume the payment of the Powell mortgage?

A. It was understood that I was to pay the Powell mortgage. The property really was mine that was purchased from Powell at the time, although it was taken from Henry H. Walker at the time.

(Signature waived by consent of counsel.)

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*Testimony of Elias Greenebaum, by Mr. Pence.*

Int. 1. Please state your name, age, residence and occupation?

Ans. Elias Greenebaum.

Q. What do you know about the payment of the notes secured by the Pickett trust deed upon block 16, in Packer's subdivision in question?

A. I know that the note was paid at the Prairie State Loan and Trust Company Bank on the West Side.

Q. How did you know?

A. They have shown it on the copy book.

Q. What interest had you in the matter at the time?

A. I wanted to buy the Kinney mortgage.

Q. Then the Wheeler trust deed stood ahead of the Kinney mortgage?

A. Yes, sir; because it was not released.

Q. And you went with Mr. Walker to this bank, and they showed you a letter which they had written?

A. Yes, sir.

Q. They admitted the money had been paid there at the bank?

A. Yes, sir; that money and interest on the other.

Q. Have you talked to Mr. Grant since about the notes and trust deed upon blocks 17 and 18?

A. At the time there was; I went to Mr. Grant to see what mortgages he held.

Q. You made this investigation at the time with reference to the purchase of the trust deed of Kinney to Rogers?

A. Yes, sir.

Q. The late firm of Greenebaum and Foreman still own and hold the trust deed of Kinney to Rogers to secure a note of $12,000?

A. Yes, sir.

Q. It has not been paid, or any part of it?

A. No, sir.

Q. And that is the Kinney trust deed referred to, upon block 16?

A. Yes, sir.

Q. A portion of that trust deed was afterwards released, was it not; when Mr. Orvis purchased the south 100 feet?

A. Yes, sir.

Q. And you took a trust deed of Orvis, as collateral to that?

A. Yes, sir.
Q. But the note has not been paid, or any portion of it?
A. The note has not been paid, or any portion of it.
Q. I understand, then, that the Orvis note of $4,000 on the south 100 feet is held by you as collateral security to the Kinney note and trust deed?
A. Yes, sir.
Q. And that is the same trust deed which is in my possession, and which was produced here upon the other examination.
A. Yes, sir.
Q. The Orvis and the Kinney trust deed?
A. Yes, sir.

*Cross-examination, By Mr. Quigg.*

Q. I understand that the information which you have regarding the payment of this note you got from the cashier of the Prairie State Loan and Savings' Company?
A. Yes, sir.
Q. You have no personal knowledge in regard to the payment?
A. No other knowledge than that received from the ——
Q. The knowledge you received you derived from a letter-press copy of a letter?
A. Yes, sir.
Q. And from the cashier?
A. Yes, sir.
Q. I will ask you if that letter specified upon what block this payment was made, or did it mention a payment of money generally?
A. It mentioned the principal, which was due, and the interest upon the other note.
Q. That was all?
A. Yes, sir; the $7500 which was due that day, on the 5th of October—due that day—and the interest on the three—interest on that, and interest on the other mortgages which were not due.

*Re-direct Examination by Mr. Pence.*

Q. Did Mr. Walker tell you at the time you bought the Kinney mortgage that the notes secured by 16 had been paid?
A. Yes, sir.
(Signature waived by consent of counsel.)
(Endorsed.)
Filed March 27, 1875.

WM. H. BRADLEY, *Clk.*

Afterwards, to wit: on the 5th day of April, A. D. 1875, said defendant, Sherman A. Ricker, by his solicitors, filed in said Clerk's office his exceptions to the said report of the Master in Chancery in said entitled cause, which said exceptions are in the words and figures following, to wit:

*Exceptions to Master's Report.*

UNITED STATES OF AMERICA,
Northern District of Illinois. } ss.

In Circuit Court of the United States, in and for said district.

NATHAN POWELL
*vs.*
HENRY H. WALKER, SHERMAN A. RICKER ET AL. } Bill and Cross-Bill.

And now comes the said Sherman A. Ricker, one of the defendants in the original Bill of Complaint herein, and complainant in the cross-bill herein, by Fuller & Smith, his solicitors, and excepts to the report of the Master in Chancery heretofore, to wit: on the 27th day of March, A. D. 1875, filed herein, for the following reasons, viz:

*Exception* 1. Said report finds that block fourteen (14), Packer's subdivision, &c., owned by said Sherman A. Ricker, is first liable to sale under said mortgage; whereas, it should find that said lot is not first liable to sale.

*Exception* 2. Said report does not find that block sixteen (16) is liable to sale before block fourteen (14); whereas, it should find that said block sixteen (16) is so liable to sale before said block fourteen (14).

*Exception* 3. Said report does not find that the 201 feet of block sixteen (16) is liable to sale before said block fourteen (14), whereas, it should so find.

*Exception* 4. Said report does not find that the 100 feet of said block sixteen (16) is liable to sale before said block fourteen (14); whereas, it should so find.

*Exception* 5. Said report does not find that the south half (S.½) of block eighteen (18), in said Packer's subdivision, should be first sold under said foreclosure proceedings; whereas, it should so find.

*Exception* 6. Said report does not (in terms) find that the securities in the hands of Robert Hervey, Esquire, are liable to sale before any portion of the mortgaged premises can be sold; whereas, it should so find.

Wherefore the said Sherman A. Ricker excepts to the said report of the Master in Chancery filed herein, and appeals therefrom to the judgment of this Hon. Court.

FULLER & SMITH,
*Solicitors for S. A. Ricker.*

(Endorsed:)
Filed April 5, 1875.
WM. H. BRADLEY, *Cl'k.*

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Afterwards, to wit: on the 14th day of April, A. D. 1875, in the said adjourned March term of said court, in the record of the pro-

ceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, District Judge, is the following entry, to wit:

NATHAN POWELL
*vs.*
HENRY H. WALKER. } In Chancery.

On motion, the exceptions to the Master's report herein are set for hearing on Monday, the twenty-sixth day of April, instant.

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Afterwards, to wit: on the 26th day of April, A. D. 1875, in the said adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, District Judge, is the following entry, to wit:

NATHAN POWELL
*vs.*
HENRY H. WALKER ET AL. } In Chancery.

On motion, the hearing on exceptions to report of Master herein, is postponed to a future day.

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Afterwards, to wit: on the 12th day of May, A. D. 1875, in the adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, District Judge, is the following entry, to wit:

NATHAN POWELL
*vs.*
HENRY H. WALKER ET AL. } In Chancery.

Now come the defendants, by their solicitors, and come on to be heard the exceptions of S. A. Ricker to the report of Henry W. Bishop, Esq., Master herein, and after hearing the same, the Court, not being now sufficiently advised in the premises, takes the same under advisement.

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Afterwards, to wit: on the 15th day of May, A. D. 1875, in the said adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, District Judge, is the following entry, to wit:

NATHAN POWELL
*vs.*
HENRY H. WALKER ET AL. } In Chancery.

Now come the parties, by their solicitors, and this cause having been heretofore brought on to be heard upon the exceptions of S. A. Ricker to the report of the Master filed herein, and the same having been fully argued and considered, the court sustains said exceptions so far as they relate to block fourteen, therein mentioned, which was by said Master found to be first liable to sale under this proceeding; and it is therefore ordered that said report be reformed by providing that block sixteen (16) shall first be sold in the way

mentioned in said report, and after that block fourteen (14), and that then the order of sale as indicated in said report, shall be followed.

Afterwards, to wit: on the 5th day of June, A. D. 1875, in the said adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

*Decree.*

NATHAN POWELL
*vs.*
HENRY H. WALKER, SAMUEL J. WALKER, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brennock, Patrick Brennock, Julius Rosenthal, Emerson G. Orvis, Elias Greenebaum, Mary E. Orvis, John Somes, William P. Frailey, William Flannigan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, The Northwestern Fertilizing Company, The Third National Bank of St. Louis, James Q. Minschall, John P. Squire, Gerhard Foreman, Levi Abt, The International Bank, Charles S. Symonds and Daniel Pratt, as assignees in bankruptcy of the People's Safe Deposit and Savings Institution of the State of New York. } In Chancery.

This cause having this day been brought on to be heard upon the Bill of Complaint filed herein, and the answers thereto, respectively, of the defendants, Henry H. Walker, Samuel J. Walker, John G. Rogers, Sherman A. Ricker, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, John Brennock, Patrick Brennock, Julius Rosenthal, Emerson G. Orvis, Mary E. Orvis, John P. Squires, John Somes, William P. Frailey, Abner Taylor, The Northwestern Fertilizing Company, Elias Greenebaum, Gerhard Foreman, Levi Abt, The International Bank, Francis A. Hoffman, and upon the answer of Charles S. Symonds and Daniel Pratt, as assignees in bankruptcy of the People's Safe Deposit and Savings Institution of the State of New York, and upon the replications of the complainant to such answers, respectively; and upon said Bill of Complaint taken as confessed by Brian Philpot, Adeline M. Philpot, Bacon Wheeler, Wirt Dexter, William Flannigan, Flannigan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Cyrus H. McCormick, The Third National Bank of St. Louis, James

Q. Minschall, the other of said defendants, and also upon the cross-bill of complaint, filed in said cause by Sherman A. Ricker, one of the defendants to said cause, taken as confessed by all the defendants therein named; and also upon the cross-bill of complaint filed in said cause by Emerson G. Orvis, another of said defendants, and upon the report of the Master in Chancery, with the testimony of the several witnesses, and other proofs therewith submitted, heretofore filed herein; and the Court having also considered the stipulation of Samuel J. Walker, Henry H. Walker, Louisa M. Tillinghast and William Flannagan, also filed herein, and having heard the allegations and proofs and pleas of the several counsel, and being now fully advised in the premises, finds that the south one-half (S. ½), of the northeast one-quarter (N. E. ¼), of the southwest one-quarter (S. W. ¼), of section five (5), township thirty-eight (38) north, of range fourteen (14) east, of the third (3d) principal meridian, in Cook county, in the State of Illinois, is the property covered by the mortgage to the said Nathan Powell, complainant herein, and liable for the payment of the amount now due on the note secured by said mortgage, to-wit: the sum of fourteen thousand, eight hundred and fifty-three dollars and thirty-three cents.

The court also finds that the material allegations of the cross-bill filed herein by Sherman A. Ricker, one of the defendants, are sustained by the proofs, and that there is in the hands of Louisa M. Tillinghast, and in the hands of Robert Hervey, attorney of William Flannagan, certain moneys, notes or securities, arising from sales or contracts of sale of portions of the above described premises, so as aforesaid conveyed in mortgage to the said Nathan Powell, which ought in equity to be brought into court here, to be sold under the direction of the court, and first applied to the liquidation of the amount due on said mortgage of said complainant as set out in said cross-bill, and under and according to the stipulation aforesaid filed herein.

The court also finds that the premises covered by said mortgage, as aforesaid, have been subdivided since the date of said mortgage, and that the property covered by said mortgage is now known and described as blocks thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17) and eighteen (18), of Packer's subdivision of the northeast quarter (N. E. ¼), of the southwest quarter (S. W. ¼) of section five (5), township thirty-eight (38) north of range fourteen (14) east, of the third (3d), principal meridian. That since the giving of said mortgage by Henry H. Walker to said complainant, conveyances of different blocks and parts of blocks in said subdivision have been made, and that, following the inverse order of the alienation thereof, the said blocks and parts of blocks are liable to be, and should be sold in the following order, viz:

*First.*—The north two hundred and one (201), feet of block sixteen, in said subdivision, excepting and reserving therefrom all the estate, right, title, interest, claim, property and demand, of the said John G. Rogers, and of the said Elias Greenebaum and Gerhard Foreman therein, under and by virtue of the certain deed of trust executed by John D. Kinney to said John G. Rogers, bearing date

the twenty-fifth day of November, A. D. 1872, and filed for record in the recorder's office of Cook County, Illinois, on the twenty-third day of October, A. D. 1873, and recorded therein in book 266, on page 453, and subject thereto.

*Second.*—The south one hundred (100) feet of said block sixteen.

*Third.*—Block fourteen (14) in said subdivision.

*Fourth.*—All the said estate, right, title, interest, claim, property and demand of the said John G. Rogers and of the said Elias Greenebaum and Gerhard Foreman, of, in and to the said north two hundred and one (201) feet of said block sixteen (16), under and by virtue of said deed of trust, so as aforesaid, executed by said John D. Kinney to said John G. Rogers, hereinbefore excepted and reserved.

*Fifth.*—Blocks thirteen (13) and eighteen (18), in said subdivision.

*Sixth.*—Block fifteen (15) in said subdivision.

*Seventh.*—Block seventeen (17) in said subdivision.

And this Court being fully advised in the premises, doth find and adjudge that all the material allegations in the said Bill of Complaint and in said cross-bill of Sherman A. Ricker contained, have been fully proved, and that there is due to said Nathan Powell, the complainant in this cause, from the said defendants, Henry H. Walker and Samuel J. Walker, the sum of fourteen thousand eight hundred and fifty-three dollars and thirty-three cents, with interest thereon from the seventeenth day of March, A. D. 1875, the date of said Master's report.

It is, therefore, upon motion of counsel for the complainant, ordered, adjudged and decreed, and this Court, by virtue of the power and authority in it vested, doth order, adjudge, and decree, that the said Louisa M. Tillinghast pay or cause to be paid into Court, within ten days from the entry of this decree, the sum of twelve thousand six hundred and sixty and 7-100 dollars, being the amount due from said Louisa M. Tillinghast as purchase money of the south half of block eighteen (18) in said Packer's subdivision, according to the contract of sale heretofore executed between said Tillinghast, Samuel J. Walker, William F. Coolbaugh, and Heman G. Powers.

And it is further ordered, adjudged and decreed by the Court, that the said William Flannagan pay, or cause to be paid into Court, within ten days from the entry of this decree, the sum of eleven thousand, eight hundred and forty-three 33-100 dollars, being the amount agreed to be paid by said Flannagan, as part purchase money, for the north two hundred and one (201) feet of block sixteen (16), in said Packer's subdivision, with accrued interest thereon; the said sums, and each of them so to be paid into Court, to be applied under the direction of the Court, as the rights of the parties may appear, and as to equity shall seem meet.

It is further ordered, adjudged and decreed by the Court, that if the said Louisa M. Tillinghast and the said William Flannagan shall fail to pay or cause to be paid into Court, within the time aforesaid, the said several sums of money so as aforesaid ordered to be paid into Court; or if from any cause a sum of money sufficient to liquidate the amount due said complainant Powell on the mortgage aforesaid shall not be realized out of said Tillinghast and Flan-

nagan moneys, so as aforesaid ordered to be paid into Court, then it is further ordered, adjudged and decreed by the Court, that unless the said Henry H. Walker, or some of the other defendants in this case, pay or cause to be paid to the complainant, within one hundred days from the entry of this decree, the said sum so found to be due to complainant, with interest thereon from the said seventeenth day of March, A. D. 1875, being the date of said Master's report, the said mortgaged premises, or so much of the same as may be necessary for the payment of the amount due on said mortgage, with costs of this suit, be sold at public auction, by or under the direction of the Master in Chancery of this Court, and that said Master make such sale in accordance with the course and practice of this Court, and that at such sale the complainant, or any of the parties to this suit, may become the purchaser.

It is further ordered, adjudged and decreed, that said Master first offer said premises separately, in parcels, in the manner and order as hereinabove provided; and if, when offered in that way, an amount sufficient to pay what is due and owing to complainant cannot be realized, that then the said Master offer and sell said premises as a whole, by the description thereof herein first above named, and without reference to any subdivision thereof whatever, and without any exception or reservation therefrom whatever.

It is further ordered, that the cross-bill of complaint filed in this cause by said Emerson G. Orvis, be dismissed for want of equity.

It is further ordered, that said Master make report to this Court of such sale, and of his acts and doings hereunder, for approval and confirmation, and for further direction herein, and that he retain from the proceeds of said sale the amount of his fees, disbursements and commissions thereon, and bring the residue of such proceeds, if any, into Court, to abide the further order of the Court; and that he take the receipt of the clerk, of this Court therefor, and file the same with said report; and if the moneys arising from such sale shall be insufficient to pay the amount so found and adjudged to be due to the complainant, with the interest thereon, and the costs of suit, and expenses of sale, as aforesaid; that the said Master specify the amount of such deficiency in his said report of sale.

And it is further ordered, that the clerk of this court hold such moneys so to be paid him by said Master, subject to the further order and direction of this court in this cause.

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Afterwards, to-wit, on the 29th day of July, A. D. 1875, in the July term of said Court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, District Judge, is the following entry, to-wit:

NATHAN POWELL
*vs.*
HENRY H. WALKER ET AL. } In Chancery.

Now comes the defendant, Emerson G. Orvis, by his solicitor, and prays an appeal to the Supreme Court of the United States, which is

allowed upon said defendant giving bond herein, by the fifteenth day of August next, with security to be approved by the court, in the sum of five thousand dollars.

And afterwards, to wit, on the 14th day of August, A. D. 1875, the following order was filed in the office of the clerk of said Court:

STATE OF ILLINOIS, ss.

Ordered that the time for filing the bond in this case be extended to the eighteenth day of August instant. Given under my hand, at Chambers, in Bloomington, August 14th, 1875.

DAVID DAVIS, *Judge.*

(Endorsed:)
Filed August 14, 1875.
WM. H. BRADLEY, *Clk.*

Afterwards, to wit, on the 16th day of August, A. D. 1875, said defendant, Orvis, filed in said clerk's office, his bond in appeal in said entitled cause, which said bond is in the words and figures following, to wit:

*Appeal Bond.*

UNITED STATES OF AMERICA,
State of Illinois, } ss.

In the Circuit Court of the United States, for the Northern District of Illinois.

NATHAN POWELL
*v.*
HENRY H. WALKER, EMERSON G. ORVIS ET AL. } Chancery.

Know all men by these presents, that we, Emerson G. Orvis and George Taylor, of Chicago, in said district, are held and firmly bound unto Nathan Powell, in the full and just sum of five thousand dollars ($5,000), to be paid to the said Nathan Powell, his certain attorney, executor, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, by these presents, sealed with our seals, and dated this sixteenth (16th) day of August, A. D. 1875.

Whereas, lately, at a term of said United States Circuit Court, for the Northern District of Illinois, in the seventh (7th) judicial circuit, in a cause depending therein between Nathan Powell, complainant, and Henry H. Walker and Emerson G. Orvis et al., respondents, heard and determined on the fifth (5th) day of June, A. D. 1875, a decree was rendered against said respondents for a foreclosure of the mortgage sought to be foreclosed by said complainant herein; from which said decree and order of sale the said Emerson G. Orvis has prayed for and obtained an appeal to the Supreme Court of the United States, to be holden at the city of Washington, the second day of October next.

Now, the consideration of the above obligation is such, that if the

said Emerson G. Orvis and George Taylor shall prosecute said appeal to effect, and answer all damages and costs if he fail to make said appeal good, and to secure a reversal or modification of said decree and order of sale, then the above obligation to be void, otherwise in full force and effect.

Witness our hands and seals, the day and year first above written.

EMERSON G. ORVIS, [SEAL.]
GEO. TAYLOR. [SEAL.]

Signed, sealed and delivered, in the presence of
HUGH ALEXANDER, JR.
Approved. H. W. BLODGETT.

(Endorsed:)
Filed August 16, 1875.
WM. H. BRADLEY, *Cl'k.*

And on the same day, to wit: the 16th day of August, A. D. 1875, the following certificate of evidence was filed in said clerk's office, in the words and figures following, to wit:

*Certificate of Evidence.*

UNITED STATES OF AMERICA, } ss.
State of Illinois, }

In Circuit Court of the United States, for the Northern District of Illinois.

NATHAN POWELL
*v.*
HENRY H. WALKER, EMERSON G. ORVIS, ET AL. } In Chancery.

Be it remembered, that on the 27th day of March, A. D. 1875, the Master in Chancery of said court filed herein his report and the testimony taken by him upon reference of above cause to him.

I certify that the following is a correct statement of the evidence and exhibits submitted to the court by such report:

On complainant's behalf was offered the mortgage and note of said Henry H. Walker to Nathan Powell, sought to be foreclosed hereby, and which is in the words and figures following, to wit:

"This indenture, made this eighth (8th) day of April, in the year of our Lord one thousand eight hundred and sixty *sixty*-nine (A. D. 1869), between Henry H. Walker (bachelor), of the city of Chicago, County of Cook, and State of Illinois, party of the first part, and Nathan Powell, of the city of Madison and State of Indiana, party of the second part, witnesseth: that whereas, the said party of the first part is justly indebted to the said party of the second part in the sum of forty thousand five hundred ($40,500) dollars, secured to be paid by one certain promissory note, executed by Henry H. Walker and Samuel J. Walker for said sum, bearing date March 13th, A. D. 1869, and payable to the order of the said Nathan Powell, twelve (12) months from the date thereof with interest at the rate of

ten (10) per cent. per annum, at the Second National Bank, Chicago, Illinois.

Now, therefore, this indenture witnesseth, that the said party of the first part, for the better securing the payment of the money aforsaid, with interest thereon, according to the tenor and effect of the said promissory note above mentioned, and also in consideration of the further sum of one dollar in hand, paid by the said party of the second part, at the delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents, does grant, bargain, sell and convey, unto the said party of the second part, his heirs and assigns forever, all the following described lot, piece or parcel of land, situate in the county of Cook, and State of Illinois, and known and described as follows, to-wit:

The northeast quarter of the southwest quarter of section number five (5), in township number thirty-eight (38), north range fourteen (14), east of the third principal meridian.

(One 50-cent and four 10-cent internal revenue stamps, cancelled.)

To have and to hold the same, together with all and singular the tenements, hereditaments, privileges and appurtenances thereunto belonging or in any wise appertaining; and also all the estate, interest and claim whatsoever, in law as well as in equity, which the party of the first part has in and to the premises hereby conveyed unto the said party of the second part, his heirs and assigns, and to their only proper use, benefit and behoof.

Provided always, and these presents are upon this express condition, that if the said party of the first part, his heirs, executors and administrators or assigns shall well and truly pay or cause to be paid to the said party of the second part, his heirs, executors and administrators or assigns, the aforesaid sum of money with such interest thereon, at the time and in the manner specified in the above mentioned promissory note, according to the true intent and meaning thereof, then and in that case these presents and everything herein expressed shall be absolutely null and void.

But it is further provided and agreed, that if default be made in the payment of the said promissory note, either of principal or interest, on the days whereon the same shall become due and payable, the whole of said principal and interest secured by the said promissory note in this mortgage mentioned, shall thereupon, at the option of said party of the second part, become immediately due and payable; anything herein or in said promissory note contained, to the contrary notwithstanding.

And this mortgage may be immediately foreclosed to pay the same by said party of the second part, his heirs, executors, administrators, or assigns; or the said party of the second part, his heirs, executors, administrators, or assigns, after publishing a notice in a newspaper printed in the city of Chicago, Cook county, Illinois, thirty (30) days before the day of such sale, may sell the said premises, and all right and equity of redemption of the ——— Henry H. Walker, party of the first part, his heirs, and assigns therein, at public auction, at the

court house door in said city of Chicago, to the highest bidder, for cash, at the time mentioned in such notice.

And the said party of the first part, hereby specially covenants and agrees to and with said party of the second part, to waive his right of equity and redemption; and the said party of the second part to make, execute, and deliver to the purchaser or purchasers thereof a deed or deeds for the premises sold, and out of the proceeds of such sale to pay all costs and expenses incurred in advertising and selling said premises, also the principal and interest due on said promissory note, and to render the overplus, if any, to said Henry H. Walker, his heirs or assigns, at the office of said party of the first part, in Chicago, Illinois.

And the said party of the first part does hereby covenant and agree with the said party of the second part, that at the time of delivery hereof, the said party of the first part is the lawful owner of the premises above granted, and seized thereof in fee-simple absolute; that he will warrant and defend the above granted premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns forever, and they are free from all incumbrances whatsoever.

And the said Henry H. Walker, party of the first part, hereby expressly waives and releases any and all right, benefit, privilege, advantage and exemption, under or by virtue of any and all statutes of the State of Illinois, providing for the exemption of homesteads from sale on execution or otherwise, and especially under the act entitled, "An act to exempt homesteads from sale on execution," passed by the General Assembly of the State of Illinois, A. D. 1851, and approved February 11th, A. D. 1851; and an act entitled "An act to amend an act entitled, 'An act to exempt homesteads from sale on execution,'" passed by said Assembly, A. D. 1857, and approved February 17, A. D. 1857.

In witness whereof, the party of the first part hereunto set his hand and seal, the day and year first above written.

HENRY H. WALKER. [SEAL.]

Signed, sealed and delivered, in the presence of

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STATE OF ILLINOIS, }
City of Chicago, Cook County. } ss.

I, John P. Olinger, a notary public, in and for the said city, in said county, in the State aforesaid, do hereby certify that Henry H. Walker, who is personally known to me to be the same person whose name is subscribed to the foregoing deed, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this twenty-second day of May, A. D. 1869.

[SEAL.] JOHN P. OLINGER, *Notary Public.*

No. 13,083.

STATE OF ILLINOIS, }
Cook County. }

This instrument was filed for record on the 25th day of May, A. D. 1869, at the hour of 5 o'clock P. M., and duly recorded in book 133 of mortgages, at page 40.

NORMAN GASSETTE,
*Clerk of Circuit Court and ex-officio Recorder.*

$40,500.00.] CHICAGO, March 13th, 1869.

Twelve months after date we promise to pay to the order of Nathan Powell forty thousand five hundred ($40,500) dollars, at the Second National Bank, Chicago, Illinois, for value received, with interest from the day of the date thereof, until paid, at ten per centum per annum.

HENRY H. WALKER,
SAM'L J. WALKER.

Secured by mortgage deed of the date of April 8th, 1869, duly stamped. (Endorsed.) Rec'd int. on the within note to 13th day of Sept., 1870. Rec'd on the within note 20,500, Sept. 17, '70, at Chicago. Rec'd on the within note 8,000 (eight thousand) dollars, Dec. 12, '70. N. Powell. Int. paid to April 12, '71. Int. paid to 13th June, 1872. Int. paid to 1st Nov'r, 1872.

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On defendant's behalf, the depositions of Berthold Loewenthal, A. M. Pence, Joseph E. Smith, Henry H. Walker, Robert W. Ralston, with exhibits; Samuel J. Walker, Elias Greenebaum, Hugh Alexder, Jr., the answers of Charles L. Symonds, and Daniel Pratt, as assignees in bankruptcy of the People's Safe Deposit and Savings Institution of the State of New York; memoranda of appointment of said Symonds and Pratt as such assignees, and certificate thereof by Winfield Robbins, clerk of the District Court of the United States, for Northern District of New York, marked "Exhibit K;" depositions of Robert Hervey and Daniel L. Boone, which are heretofore set out in this record.

An abstract of title to the northeast quarter of the southwest quarter of section five, township number thirty-eight north, of range fourteen, and east of the 3d P. M., in Cook County, Illinois, and which is in the words and figures following, to-wit:

*Abstract.*

Nathan Powell and wife to Henry H. Walker. Doc. 13080. Deed dated April 1, 1869, and recorded May 25, 1869, in book 537, page 87. Convey the und. ¼ of S. W. ¼ of section 5, T. 38, N. R. 14 E.

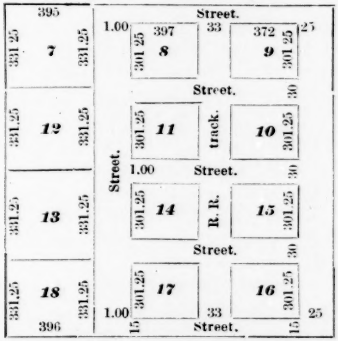
Henry H. Walker to Nathan Powell. Doc. 13083. Mortgage, dated April 8, 1869, and recorded May 25, 1869, in book 133 of mortgages, page 40. Conveys the N. E. ¼ of S. W. ¼ of section 5, T. 38, N. R. 14 E.

Nathan Powell to Henry H. Walker. Doc. 66468. Release deed,

dated Sept. 12, 1870, and recorded Sept. 19, 1870, in book 598, page 610. Releases the N. ½ of N. E. ¼ of S. W. ¼ of section 5, T. 38, N. R. 14 E. from mortgage recorded in book 133 of mortgages, page 40.

Henry H. Walker to Sam'l J. Walker. Doc. 66466. Quit-claim deed dated April 12, 1870, and recorded Sept. 19, 1870, in book 574, page 428. Conveys the N. E. ¼ of S. W. ¼ of section 5, T. 38, N. R. 14 E.

Subdivision by Samuel J. Walker. Doc. 66615. Plat entitled "Packer's subdivision of the N. E. ¼ of the S. W. ¼ of Sec. 5, T. 37, R. 14." Recorded Sept. 30, 1870, in book 172 of maps, page 25, as follows:




Sam'l J. Walker to William Flanagan. Doc. 159926. Receipt dated Feb'y 27, 1874, and recorded April 4, 1874, in book 336, page 230. For $500, on account of purchase of the north 200 feet, of block 16, in Packer's addition of the northeast quarter of southwest quarter of Sec. 5, T. 38, R. 14 E. in Cook County, Illinois.

Henry H. Walker (bachelor) to William Flanagan. Doc. 161903. Warranty deed, dated Feb'y 27, 1874, and recorded April 15, 1874, in book 305, page 628. Conveys land in Cook County, Illinois, to-wit: The north 201 feet of block 16, of Packer's subdivision of the northeast quarter of the southwest quarter of Sec. 5, T. 38, N. R. 14 E. of the 3d P. M.

Samuel J. Walker and Henry H. Walker, with Emerson G. Orvis. Doc. 152810. Agreement, dated Feb'y 26, 1874, and recorded Feb'y 26, 1874, in book 288, page 183. For conveyance by warranty deed, of the south 100 feet of block 16, in Packer's subdivision of the northeast quarter of the southwest quarter of Sec. 5, in T. 38, N. of R. 14, E. of the 3rd P. M., in town of Lake, Cook county, Illinois.

Henry H. Walker (bachelor), to Emerson G. Orvis. Doc. 160769. Warranty deed, dated Feb'y 26, 1874, and recorded April 9, 1874, in book 391, page 27. Conveys land in Cook county, Illinois, to-wit: The south 100 feet of block 16, of Packer's subdivision of the northeast quarter of the southwest quarter of Sec. 5, T. 38, N. R. 14, E. of the 3rd P. M.

Samuel J. Walker and Amanda M., his wife, to Sherman A. Ricker.

Doc. 93853. Warranty deed dated Feb'y 25, 1873, and recorded April 5, 1873, in book 132, page 441. Convey land in Cook county, Illinois, to-wit: Block 14 of Packer's subdivision of the northeast quarter of the southwest quarter of Sec. 5, T. 38 N., R. 14 E. of the 3rd P. M.

Also, as appurtenant to the property herein conveyed, the right to use, in common with others owning property in said subdivision any and all streets and alleys, together with the railroad street, or right of way, and the railroad tracks laid down thereon, as shown on the recorded plat of said subdivision, no exclusive rights in any street, however, being hereby conveyed, or intended to be given.

Samuel J. Walker and Amanda M., his wife, to John D. Kinney. Doc. 71268. Warranty deed, dated Nov. 25, 1872, and recorded Dec. 2, 1872, in book 131, page 364. Convey the following described lots of land in Cook county, Illinois, to-wit: Blocks numbers 7 and 16 in Packer's subdivision of the northeast quarter of the southwest quarter of Sec. 5, T. 38 N., R. 14, E. of the 3d P. M.

John D. Kinney, of Cincinnati, to John G. Rogers. Doc. 132298. Trust deed, dated Nov. 25, 1872, and recorded Oct. 23, 1873, in book 266, page 453. Conveys premises in Cook county, Illinois, described as follows, to-wit: Block number 16 in Packer's subdivision of the northeast quarter of the southwest quarter of section 5, T. 38 N., R. 14, E. of the 3d P. M.

John G. Rogers, trustee, to John D. Kinney. Doc. 162,420. Release deed, dated April 8, 1874, and recorded April 16, 1874, in book 369, page 289. Releases the south 100 feet of block 16 of Packer's subdivision of the northeast quarter of the southwest quarter of section 5 T. 38 N., R. 14, E. of the 3rd P. M. from lien of trust deed dated Nov. 25, 1872, and recorded in book 266, page 453.

John D. Kinney and wife to Henry H. Walker. Doc. 156,092. Quit-claim deed dated March 6, 1874, and recorded March 16, 1874, in book 134, page 488. Convey and quit-claim block 16, in Packer's subdivision of the Northeast quarter of the southwest quarter of Sec. 5, T. 38 N., R. 14, E. of the 3rd P. M., in Cook County, Illinois.

Samuel J. Walker and wife, to Patrick Brennock. Doc. 61,359. Warranty deed dated March 8, 1872, and recorded Oct. 10, 1872, in book 131, page 23. Convey block 15, in Packer's subdivision of the northeast quarter of the southwest quarter of Sec. 5, T. 38 N., R. 14, E. of the 3rd P. M., in Cook county, Illinois.

Samuel J. Walker and Amanda M., his wife, to Robert W. Ralston. Doc. 54094. Warranty deed, dated Oct. 2, 1871, and recorded Sept. 4, 1872, in book 130, page 316. Convey block 17, in Packer's subdivision of the northeast quarter of the southwest quarter of Section 5, T. 38 N., R. 14., E. of the 3d P. M., in Cook county, Illinois.

Samuel J. Walker and wife, by her attorney, to Brian Philpot. Doc. 76171. Warranty deed, dated Sept. 10, 1870, and recorded Dec. 9, 1870, in book 606, page 548. Convey lot 13 in Packer's subdivision of the N. E. quarter of the S. W. quarter of Sec. 5, T. 38, R. 14 E.

Samuel J. Walker and wife to Henry E. Pickett. Doc. 68324.

Warranty deed, dated Oct. 1, 1870, and recorded Oct. 5, 1870, in book 633, page 220. Convey blocks 16, 17 and 18, in Packer's subdivision of the N. E. quarter of the S. W. quarter of section 5, T. 38, R. 14 E.

Henry E. Pickett to Bacon Wheeler. Doc. 68326. Trust deed, dated Oct. 1, 1870 and recorded Oct. 5, 1870, in book 599, page 352. Conveys block 16, in Packer's subdivision of the N. E. quarter of S. W. quarter of section 5, T. 38, R. 14 E.

Henry E. Pickett to Bacon Wheeler. Doc. 68325. Trust deed, dated Oct. 1, 1870, and recorded Oct. 5, 1870, in book 599, page 351. Conveys block 17 in Packer's subdivision of the N. E. quarter of the S. W. quarter of section 5, T. 38, R. 14 E.

Henry E. Pickett to Bacon Wheeler. Doc. 68327. Trust deed, dated Oct. 1, 1870, and recorded Oct. 5, 1870, in book 599, page 353. Conveys lot 18 in Packer's subdivision of the N. E. ¼ of the S. W. ¼ of Sec. 5, T. 38, R. 14 E.

Henry E. Pickett and wife to Samuel J. Walker. Doc. 11267. Quit-claim deed, dated Sept. 20, 1871, and recorded Sept. 28, 1871. Convey blocks 16, 17 and 18, in Packer's subdivision of the N. E. ¼ of the S. W. ¼ of section 5, T. 38, R. 14, E.

Sam'l J. Walker and wife, by her attorney, to Francis A. Hoffman. Doc. 67596. Trust deed, dated Sept. 26, 1870, and recorded Sept. 29, 1870, in book 599, p. 331. Convey blocks 14 and 15, Packer's subdivision, N. E. ¼, S. W. ¼, Sec. 5, aforesaid.

Francis A. Hoffman, trustee, to Samuel J. Walker. Doc. 93855. Release deed, dated July 1, 1872, and recorded April 5, 1873, in book 249, page 317. Releases block 14, in Packer's subdivision of the northeast quarter of the southwest quarter of section 5, T. 38 N., R. 14, E. of the 3rd P. M., from the trust deed last shown.

Samuel J. Walker, and Amanda M., his wife, to William F. Coolbaugh and Heman G. Powers. Doc. 72450. Warranty deed, dated July 1, 1872, and recorded Dec. 7, 1872, in book 202, page 102. Convey blocks 7, 12, 13, 14, 16, 18, and the south 187 25-100 feet of block 8, of Packer's subdivision of the northeast quarter of the southwest quarter of section 5, T. 38 N., R. 14, E. of the 3rd P. M. Also, as appurtenant to the property hereby conveyed, the right to use, in common with others owning property in said subdivision, any and all streets and alleys, together with the railroad street or right of way, and the railroad track laid down thereon, as shown upon the recorded plat of said subdivision.

William F. Coolbaugh, and Addie R., his wife, and Heman G. Powers, and Sarah E., his wife, to Samuel J. Walker. Doc. 93149. Quit-claim deed, dated Feb'y 25, 1873, and recorded April 3, 1873. Convey block 14, of Packer's subdivision of the northeast ¼ of the southwest ¼ of section 5, T. 38 N., R. 14, E. of 3rd P. M., in Cook county, Illinois.

William F. Coolbaugh, and Addie R., his wife, and Heman G. Powers, and Sarah E., his wife, to Samuel J. Walker. Doc. 132840. Quit-claim deed, dated Feb'y 25, 1873, and recorded Oct. 27, 1873, in book 230, page 340. Convey land in Cook county, Illinois, to wit: Block 14, of Packer's subdivision of the northeast quarter of the southwest quarter of section 5, T. 38 N., R. 14, E. of the 3rd P. M.

S. A. Ricker (bachelor) to Wirt Dexter. Doc. 133775. Trust deed, dated Oct. 29, 1873, and recorded Nov. 1, 1873, in book 332, page 75, conveys land in Cook county, Illinois, to-wit: Block 14 in Packer's subdivision of the northeast quarter of the southwest quarter of Section 5, T. 38, N., R. 14, E. of the 3rd P. M., together with all improvements situate thereon.

Patrick Brennock and wife to John Brennock. Doc. 176369. Warranty deed, dated May 23, 1874, and recorded June 26, 1874. Convey land in Cook county, Illinois, to-wit: Lot 15, in Packer's subdivision of the northeast quarter of the southwest quarter of Sec. 5, T. 38, N., R. 14, E. of the 3rd P. M.

John Brennock and wife to Julius Rosenthal. Doc. 176721. Trust deed, dated June 5, 1874, and recorded June 29, 1874. Convey land in Chicago, Cook county, Illinois, to-wit: Lots 2 and 5, in block 10, in the school section addition to Chicago; also block 15, in Packer's subdivision of the northeast quarter of the southwest quarter of Sec. 5, T. 38, N., R. 14, E. of the 3rd P. M.

William F. Coolbaugh and wife, and Heman G. Powers and wife, to Samuel J. Walker. Doc. 161901. Quit-claim deed, dated Feb'y 25, 1874, and recorded April 15, 1874, in book 254, page 142. Convey land in Cook county, Illinois, to-wit: Block 16, of Packer's subdivision of the northeast quarter of the southwest quarter of Sec. 5, T. 38, N., R. 14, E. of the 3rd P. M.

Samuel J. Walker and wife to Henry H. Walker. Doc. 161902. Quit-claim deed, dated April 11, 1874, and recorded April 15, 1874, in book 134, page 546. Convey and quit-claim block 16, of Packer's subdivision of the northeast quarter of the southwest quarter of Sec. 5, T. 38, N., R. 14, E. of the 3rd P. M., in Cook county, Illinois.

Emerson G. Orvis to Elias Greenebaum. Doc. 160768. Trust deed, dated Feb'y 26, 1874, and recorded April 9, 1874, in book 78, page 450. Conveys land in Cook county, Illinois, to-wit: The south 100 feet of block 16, in Packer's subdivision of the northeast quarter of the southwest quarter of Sec. 5, in T. 38, N., R. 14, E. of the 3rd P. M.

Emerson G. Orvis and wife to John Somes. Doc. 167357. Trust deed, dated April 15, 1874, and recorded May 12, 1874, in book 391, page 259. Convey land in the town of Lake, Cook county, Illinois, to-wit: The south 100 feet of block 16, in Packer's subdivision of the northeast quarter of the southwest quarter of Sec. 5, T. 38, N. R. 14, E. of the 3d P. M.

William Flanagan to John G. Rogers. Doc. 161904. Trust deed dated Feb'y 27, 1874, and recorded April 15, 1874, in book 335, page 538. Conveys land in Cook county, Illinois, as follows: The north 201 feet of block 16, of Packer's subdivision of the northeast quarter of the southwest quarter of Sec. 5, T. 38, N. R. 14, E. of the 3d P. M.

Robert W. Ralston to John G. Rogers. Doc. 54104. Trust deed dated Oct. 2, 1871, and recorded Sept. 4, 1872, in book 159, page 606. Conveys block 17, in Packer's subdivision of the northeast quarter of the southwest quarter of Section 5, T. 38, N. R. 14, E. of the 3d P. M., in Cook county, Illinois.

Robert W. Ralston (bachelor), to the Northwestern Fertilizing Company, its successors or assigns. Doc. 54093. Quit-claim deed, dated Oct. 3, 1871, and recorded Sept. 4, 1872, in book 43, page 40. Conveys block 17, in Packer's subdivision of the northeast quarter of the southwest quarter of Section 5, T. 38, N. R. 14, E. of the 3d P. M. Said premises lying and being in Cook county, Illinois.

A stipulation of counsel for complainant and for respondents: That above abstract, offered in evidence, truly represents the record of the different instruments thereby shown, so far as purports the dates of filing the same, and that the same may be used as evidence in lieu of original documents, subject, however, to contradiction by any competent evidence.

And as evidence of securities, the stipulation between Samuel J. and Henry H. Walker, Louisa M. Tillinghast, and Robert Hervey, which is in the words and figures following, to-wit:

*Stipulation.*

UNITED STATES OF AMERICA, } ss.
Northern District of Illinois. }

In Circuit Court of the United States, for Northern District of Illinois.

NATHAN POWELL
*vs.*
SAMUEL J. WALKER ET AL. } Bill.

SHERMAN A. RICKER
*vs.*
NATHAN POWELL. } Cross-bill

} Foreclosure.

Before Henry W. Bishop, Esq., Master in Chancery, U. S. Court. —In reference.

Samuel J. Walker and other parties interested, respondents in above cause, hereby agree that the Master in Chancery receive, to abide the further order of the Court in this cause, all the notes, bonds and moneys alleged by said cross-bill to be in the hands of Messrs. Hervey, Anthony and Galt, attorneys-at-law, and owing by one William Flannigan to said Samuel J. Walker, or Henry H. Walker, and in the hands of Levi D. Boone, of Louisa Tillinghast, and owing to said Walkers by said Tillinghast, as the same by the testimony under said cross-bill shall be proved to exist and be owing, for the express use and purpose of applying the same to pay and remove the lien of said Nathan Powell upon the property mortgaged to him as set out in said original bill, and the said securities, or so much thereof as may be necessary to pay said Powell lien and decree, to be

marshalled and disposed of under the order of said Court for the use and purposes before named.

Chicago, March 9th, 1875.

SAM'L. J. WALKER,
ROB'T. HERVEY,
For WM. FLANAGAN,
LOUISA M. TILLINGHAST,
H. H. WALKER,

(Endorsed:)
Filed May 12, 1875,
WM. H. BRADLEY, *Cl'k.*

Correct.

J. MULVEY,
HUGH ALEXANDER, JR.,
*Sol's for Orvis.*

Approved: H. W. BLODGETT.

(Endorsed:)
Filed Aug. 16, '75.
WM. H. BRADLEY, *Cl'k.*

NORTHERN DISTRICT OF ILLINOIS, ss:

I, William H. Bradley, clerk of the Circuit Court of the United States for said District, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said Court, in the cause wherein Nathan Powell is the complainant, and Henry H. Walker et al. are the defendants, as the same appears from the files and records of said Court now remaining in my custody and control. In testimony whereof, I have hereunto set my hand, and affixed the seal of said Court, at my office in Chicago, in said district, this 6th day of October, A. D. 1875, and of our independence the 100th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsement on cover): No. 288. Emerson G. Orvis, appellant, *vs.* Nathan Powell. N. Illinois C. C. U. S.
Filed 23d October, 1875.

UNITED STATES OF AMERICA, ss:

*The President of the United States of America.*

To the Honorable the Judges of the Circuit Court of the
[Seal.] United States for the Northern District of Illinois, greeting:

Whereas, lately in the Circuit Court of the United States for the Northern District of Illinois, before you, or some of you, in a cause between Nathan Powell, complainant, and Henry H. Walker, Samuel J. Walker, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brennock, Patrick Brennock, Julius Rosenthal, Emerson G. Orvis, Elias Greenebaum, Mary E. Orvis, John Somes, William P. Frailey, William Flannigan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, The Northwestern Fertilizing Company, The Third Nation-

al Bank of St. Louis, James Q. Minschell, John P. Squire, Gerhard Foreman, Levi Abt, The International Bank, and Charles S. Symonds and Daniel Pratt, assignees in Bankruptcy of The People's Safe Deposit and Savings Institution of the State of New York, defendants (in original bill), and Sherman A. Ricker, complainant, and Louisa M. Tillinghast, Robert Hervey, Elliott Anthony, A. T. Galt and Daniel L. Boone, defendants (in cross-bill), and Emerson G. Orvis, complainant, and William F. Coolbaugh, Heman G. Powers and Louisa M. Tillinghast, defendants (in cross-bill), wherein the decree of the said Circuit Court entered in said cause on the 5th day of June, A. D. 1875, is in the following words, viz:

This cause having this day been brought on to be heard upon the Bill of Complaint filed herein, and the answers thereto, respectively, of the defendants, Henry H. Walker, Samuel J. Walker, John G. Rogers, Sherman A. Ricker, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, John Brennock, Patrick Brennock, Julius Rosenthal, Emerson G. Orvis, Mary E. Orvis, John P. Squires, John Somes, William P. Frailey, Abner Taylor, The Northwestern Fertilizing Company, Elias Greenebaum, Gerhard Foreman, Levi Abt, The International Bank, Francis A. Hoffman, and upon the answer of Charles S. Symonds and Daniel Pratt, as assignees in bankruptcy of The People's Safe Deposit and Savings Institution of the State of New York, and upon the replications of the complainant to such answers, respectively; and upon said Bill of Complaint taken as confessed by Brian Philpot, Adeline M. Philpot, Bacon Wheeler, Wirt Dexter, William Flannigan, Flannigan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Bond, Cyrus H. McCormick, The Third National Bank of St. Louis, James Q. Minschall, the other of said defendants, and also upon the cross-bill of complaint, filed in said cause by Sherman A. Ricker, one of the defendants to said cause, taken as confessed by all the defendants therein named, and also upon the cross-bill of complaint filed in said cause by Emerson G. Orvis, another of said defendants, and upon the report of the Master in Chancery, with the testimony of the several witnesses and other proofs therewith submitted, heretofore filed herein; and the Court having also considered the stipulation of Samuel J. Walker, Henry H. Walker, Louisa M. Tillinghast, and William Flannagan, also filed herein, and having heard the allegations and proofs and pleas of the several counsel, and being now fully advised in the premises, finds that the south one-half (S. $\frac{1}{2}$), of the northeast one-quarter (N. E. $\frac{1}{4}$), of the southwest one-quarter (S. W. $\frac{1}{4}$), of section five (5), township thirty-eght (38), north of range fourteen (14), east, of the third (3d) principal meridian, in Cook county, in the State of Illinois, is the property covered by the mortgage to the said Nathan Powell, complainant herein, and liable for the payment of the amount now due on the note secured by said mortgage to-wit: the sum of fourteen thousand eight hundred and fifty-three dollars and thirty-three cents.

The Court also finds that the material allegations of the cross-bill filed herein by Sherman A. Ricker, one of the defendants, are sus-

tained by the proofs, and that there is in the hands of Louisa M. Tillinghast, and in the hands of Robert Hervey, attorney of William Flannagan, certain moneys, notes or securities arising from sales or contracts of sale of portions of the above-described premises, so as aforesaid conveyed in mortgage to the said Nathan Powell, which ought in equity to be brought into Court here to be sold under the direction of the Court, and first applied to the liquidation of the amount due on said mortgage of said complainant, as set out in said cross-bill and under, and according to the stipulation aforesaid filed herein.

The Court also finds that the premises covered by said mortgage, as aforesaid, have been subdivided since the date of said mortgage, and that the property covered by said mortgage is now known and described as blocks thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17) and eighteen (18), of Packer's subdivision of the northeast quarter (N. E. ¼) of the Southwest quarter (S. W. ¼) of Sec. five (5), township thirty-eight (38), north of range fourteen (14), east of the third principal meridian. That since the giving of said mortgage by Henry H. Walker to said complainant, conveyances of different blocks and parts of blocks in said subdivision have been made, and that following the inverse order of the alienation thereof, the said blocks and parts of blocks are liable to be, and should be sold in the following order, viz:

*First*—The north two hundred and one (201) feet of block, sixteen in said subdivision, excepting and reserving therefrom all the estate, right, title, interest, claim, property, and demand of the said John G. Rogers, and of the said Elias Greenebaum and Gerhard Foreman therein, under and by virtue of the certain deed of trust executed by John D. Kinney to said John G. Rogers, bearing date the twenty-fifth day of November, A. D. 1872, and filed for record in the Recorder's office of Cook County, Illinois, on the twenty-third day of October, A. D. 1873, and recorded therein in book 266, on page 453, and subject thereto.

*Second*—The south one hundred (100) feet of said block sixteen.

*Third*—Block fourteen (14), in said subdivision.

*Fourth*—All the said estate, right, title interest, claim, property, and demand of the said John G. Rogers, and of the said Elias Greenebaum, and Gerhard Foreman of, in and to said north two hundred and one (201) feet of said block sixteen (16), under and by virtue of said deed of trust, so as aforesaid executed by said John D. Kinney to said John G. Rogers, hereinbefore excepted and reserved.

*Fifth*—Blocks thirteen (13) and eighteen (18) in said subdivision.

*Sixth*—Block fifteen (15) in said subdivision.

*Seventh*—Block seventeen (17) in said subdivision.

And this Court, being fully advised in the premises, doth find and adjudge that all the material allegations in the said Bill of Complaint and in said cross-bill of Sherman A. Ricker contained, have been fully proved, and that there is due to said Nathan Powell, the complainant in this cause, from the said defendants, Henry H. Walker

and Samuel J. Walker, the sum of fourteen thousand eight hundred and fifty-three dollars and thirty-three cents, with interest thereon from the seventeenth day of March, A. D. 1875, the date of said Master's report.

It is, therefore, upon motion of counsel for the complainant, ordered, adjudged and decreed, and this Court, by virtue of the power and authority in it vested, doth order, adjudge and decree, that the said Louisa M. Tillinghast pay, or cause to be paid, into Court, within ten days from the entry of this decree, the sum of twelve thousand six hundred and sixty and 7-100 dollars, being the amount due from said Louisa M. Tillinghast, as purchase money of the south half of block eighteen (18), in said Packer's subdivision, according to the contract of sale heretofore executed between said Tillinghast, Samuel J. Walker, William F. Coolbaugh and Heman G. Powers.

And it is further ordered, adjudged and decreed by the Court, that the said William Flannagan pay, or cause to be paid, into court, within ten days from the day of the entry of this decree, the sum of eleven thousand eight hundred and forty-three 33-100 dollars, being the amount agreed to be paid by said Flannagan as part purchase money, for the north two hundred and one (201) feet of block sixteen (16), in said Packer's subdivision, with accrued interest thereon; the said sums and each of them, so to be paid into court to be applied under the direction of the court as the rights of the parties may appear, and as to equity shall seem meet.

It is further ordered, adjudged and decreed by the Court, that if the said Louisa M. Tillinghast and the said William Flannagan shall fail to pay or cause to be paid into Court, within the time aforesaid the said several sums of money, so as aforesaid ordered to be paid into Court; or if from any cause a sum of money sufficient to liquidate the amount due said complainant Powell, on the mortgage aforesaid, shall not be realized out of said Tillinghast and Flannagan moneys, so as aforesaid ordered to be paid into Court, then it is further ordered, adjudged and decreed by the Court that unless the said Henry H. Walker, or some of the other defendants in this case, pay or cause to be paid to the complainant, within one hundred days from the entry of this decree, the said sum so found to be due to the complainant, with interest thereon from the said seventeenth day of March, A. D. 1875, being the date of said Master's Report, the said mortgaged premises, or so much of same as may be necessary for the payment of the amount due on said mortgage with costs of this suit, be sold by public auction by or under the direction of the Master in Chancery of this Court, and that said Master make such sale in accordance with the course and practice of this Court, and that at such sale the complainant or any of the parties to this suit may become the purchaser.

It is further ordered, adjudged and decreed, that said Master first offer said premises separately, in parcels, in the manner and order, as hereinbefore provided; and if, when offered in that way, an amount sufficient to pay what is due and owing to complainant cannot be realized, that then the said Master offer and sell said premises

as a whole, by the description thereof herein first above named, and without reference to any subdivision thereof whatever, and without any exception or reservation therefrom whatever.

It is further ordered, that the cross-bill of complaint filed in this cause by said Emerson G. Orvis be dismissed for want of equity.

It is further ordered, that said Master make report to this Court of such sale, and of his acts and doings hereunder, for approval and confirmation, and for further direction herein, and that he retain from the proceeds of said sale the amount of his fees, disbursements and commissions thereon, and bring the residue of such proceeds, if any, into court to abide the further order of the Court, and that he take the receipt of the clerk of this court therefor, and file the same with said report; and if the moneys arising from such sale shall be insufficient to pay the amount so found and adjudged to be due to the complainant, with the interest thereon, and the costs of suit, and expenses of sale as aforesaid, that the said Master specify the amount of such deficiency in his said report of sale.

And it is further ordered, that the clerk of this court hold such moneys, so to be paid him by said Master, subject to the further order and directions of this court in this cause," as, by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal taken by Emerson G. Orvis, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and seventy-eight, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed, except so far as it fails to provide for redemption after sale of each parcel of land, as provided by the statute of Illinois.

And it is further ordered, that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to amend the decree by making an order for such redemption.

Costs in this Court to be paid by the appellee, and that the said Emerson G. Orvis recover against the said Nathan Powell twenty dollars for his costs herein expended and, have execution therefor. 4th November, 1878.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the twenty-third day of January, in the year of our Lord one thousand eight hundred and seventy-nine.

Costs of Emerson G. Orvis:

Clerk p'd by Nathan Powell,
Attorney, $20.00 Taxed by

20.00 D. W. MIDDLETON,
*Clerk of the Supreme Court of the United States.*

(Endorsed:)
Filed Jan'y 30, 1879.
WM. H. BRADLEY, *Clk.*
Refiled May 15, 1879.
WM. H. BRADLEY, *Clk.*

United States Circuit Court, Northern District of Illinois.

Saturday, February 8, A. D. 1879.

Present Hon. Thomas Drummond, Judge.

NATHAN POWELL
*vs.*
HENRY H. WALKER, SAMUEL J. WALKER, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brennock, Patrick Brennock, Julius Rosenthal, Emerson G. Orvis, Elias Greenebaum, Mary E. Orvis, John Somes, William P. Frailey, William Flannigan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A Belden, George Birkhoff, Mary Bond, Abner Taylor, Cyrus H. McCormick, The Northwestern Fertilizing Company, The Third National Bank of St. Louis, James Q. Minschall, John P. Squire, Gerhard Foreman, Levi Abt, The International Bank, Charles S. Squires and Daniel Pratt, assignees in Bankruptcy of the People's Safe Deposit and Savings Institution of the State of New York, } In Chancery. Original Bill.

and

SHERMAN A. RICKER
*vs.*
LOUISA M. TILLINGHAST, ROBERT HERVEY, Elliott Anthony, A. T. Galt and Daniel L. Boone, } Cross-Bill.

and

EMERSON G. ORVIS
*vs.*
WILLIAM F. COOLBAUGH, HEMAN G. POWERS and Louisa M. Tillinghast, } Cross-Bill.

Upon reading the mandate of the Supreme Court of the United

States in the above entitled cause, filed herein on January thirtieth, A. D. 1879, it is, upon motion of the solicitor for the complainant, Nathan Powell, ordered that said cause be reinstated in this Court. And it is also ordered that the sale directed to be made by the decree of this Court, entered in said cause on June fifth, A. D. 1875, of the mortgaged premises therein described, be made subject to the right of redemption therefrom, pursuant to the laws of the State of Illinois, and that said decree be, and the same is, hereby so amended.

And it is ordered that upon the confirmation of such sale, the Master in Chancery of this Court execute and deliver to the purchaser or purchasers of said premises, or any part thereof, the usual certificate therefor.

It is further ordered and decreed by the Court, that upon the expiration of fifteen months from the date of such sale, if the lands so sold shall not have been redeemed as provided by law, said defendants and all persons holding or claiming under them, or any of them, since the commencement of this suit, stand forever barred and foreclosed of all rights and equity of redemption in and to said premises so sold, and every part thereof. And that in case the premises therein mentioned are not redeemed as aforesaid, upon production to said Master or his successor in office of any certificate of purchase aforesaid by the purchaser or purchasers, their heirs or assigns, said Master, or his successor, make, execute and deliver to such holder of said certificate, a good and sufficient conveyance in fee of the premises described or intended to be described in such certificate. And, further, that upon execution of such conveyance, the grantee or grantees in such deed, their heirs or assigns, have possession of the premises conveyed in such deed, and that any of the parties to this cause who shall be in possession of said premises, or any part thereof, and every person who may have come into such possession under them or any of them since the commencement of this suit, deliver possession of and surrender said premises to such grantee or grantees, their heirs or assigns, as the case may be, upon production of such deed of conveyance.

No. 35. Supreme Court of the United States, October Term, 1878.

EMERSON G. ORVIS, *Appellant*,
*v.*
NATHAN POWELL.

It is ordered that the mandate issued in this cause on the 25th day of January, A. D. 1879, be and the same is hereby recalled; and that the clerk of the Circuit Court of the United States for the Northern District of Illinois, be and he is hereby directed to return to this Court said mandate forthwith.

And it is further ordered, that said cause be re-argued on printed briefs, to be filed on or before the 15th of April, 1879.

17th March, 1879.

True copy.

[SEAL.] Test. D. W. MIDDLETON,
*Clerk Supreme Court U. S.*

Supreme Court of the United States, October Term, 1878.

EMERSON G. ORVIS, *Appellant*,
35 *v.*
NATHAN POWELL.

Mr. Justice Miller delivered the opinion of the Court on the rehearing granted in this cause, confirming the decree heretofore entered by this Court. 28th April, 1879.

True copy. Test. D. W. MIDDLETON,
[SEAL.] *Clerk Sup. Court, U. S.*

(Endorsed,)
Filed May 15th, 1879.
WM. H. BRADLEY, *Clerk.*

United States Circuit Court, Northern District of Illinois.

Thursday, May 15, A. D. 1879.

Present Hon. Henry W. Blodgett, District Judge.

NATHAN POWELL
*v.*
HENRY H. WALKER. } In Chancery.

The mandate from the Supreme Court of the United States having this day been re-filed herein, it is ordered by the court that Henry W. Bishop, Esq., the Master in Chancery of this court, proceed to execute the decree herein.

United States Circuit Court, Northern District of Illinois.

Monday, July 7, A. D. 1879.

Present Hon. Henry W. Blodgett, District Judge.

NATHAN POWELL
*v.*
HENRY H. WALKER, SAMUEL J. WALKER, Brian Philpot, Adeline M. Philpot, John G. Rogers, Bacon Wheeler, Francis A. Hoffman, William F. Coolbaugh, Addie R. Coolbaugh, Heman G. Powers, Sarah E. Powers, Sherman A. Ricker, Wirt Dexter, John Brennock, Patrick Brennock, Julius Rosenthal, Emerson G. Orvis, Elias Greenebaum, Mary E. Orvis, John Somes, William P. Frailey, William Flannagan, Abraham Wilzinski, S. J. Marcus, John Miller, Otway Watson, Charles A. Belden, George Birkhoff, Mary Boyd, Abner Taylor, Cyrus H. McCormick, The Northwestern Fertilizing Company, The Third National Bank of St. Louis, James Q. Minschell, John P. Squire, Gerhard Foreman, Levi Abt, The International Bank, Charles S. Symonds and Daniel Pratt, as assignees in Bankruptcy of the People's Safe Deposit and Savings' Institution of the State of New York. } In Chancery.

This cause coming on again, and it appearing to the Court that a sale has been advertised to be made on the ninth day of July, A. D. 1879, under the decree heretofore rendered herein, and affirmed by the Supreme Court, and that one of the defendants, Sherman A. Ricker, has presented a petition for leave to file a bill to review said decree, which has been denied and dismissed, from which order he has prayed an appeal to the Supreme Court, and which has been allowed, and the said Sherman A. Ricker having entered his motion to stay the execution of said decree until the said appeal can be heard and decided, it is by the Court ordered that the said motion be sustained, and that said sale be stayed until the fifteenth (15th) day of November, A. D. 1879, upon condition that the said Sherman A. Ricker shall stipulate that he will perfect his appeal and file the record for the next term of the Supreme Court, and submit the same under the twentieth rule on the second day of said term, and consent to an immediate issue of a mandate upon the determination of said appeal, and file a bond executed in the penal sum of five thousand dollars to Nathan Powell, Elias Greenebaum and Gerhard Foreman, their heirs, executors and administrators, conditioned to pay all costs and damages, including attorneys' fees and expenses which they or either of them may suffer by reason of the stay of the execution of said decree in case the order and judgment appealed from is not reversed.

United States of America, Northern District of Illinois.

Circuit Court of the United States, in and for the Northern District of Illinois.

NATHAN POWELL
*v.*
HENRY H. WALKER.

In consideration that the Circuit Court of the United States in and for the Northern District of Illinois, has stayed the execution of the decree in this cause until the 15th day of November, A. D. 1879. It is stipulated on the part of Sherman A. Ricker, who has prayed an appeal to the Supreme Court of the United States from the order of said Circuit Court refusing leave to file a bill of review in said cause, that he will perfect his appeal and put said cause upon the docket of said Supreme Court in time for a hearing at the October term, A. D. 1879, thereof; and further to submit said cause to said Supreme Court upon printed briefs to be filed under the twentieth rule of said Court, on the second day of the October Term, A. D. 1879, of said Court.

And he further stipulates that a mandate may issue immediately out of said Supreme Court upon the determination of said appeal by said Court.

And it is further stipulated, that in case said Ricker shall not comply with the foregoing agreements on his part, that the order staying

the execution of said decree in this cause shall be revoked by this Court, and that said decree may be forthwith executed.

Chicago, July 7, 1879.

M. W. FULLER,
*of Counsel for Sherman A. Ricker.*
ROSENTHAL and PENCE,
*for Greenebaum & Foreman.*
JUNIUS MULVEY & E. S. ISHAM,
*Solicitors for Nathan Powell.*

(Endorsed:)
Filed July 7, 1879.
WM. H. BRADLEY, *Clk.*

Know all men by these presents, That we, Sherman A. Ricker and W. C. D Grannis, of the county of Cook and State of Illinois, and the Northern District of Illinois, are held and firmly bound unto Nathan Powell, of Indiana, and Elias Greenebaum and Gerhard Foreman, of the county and State aforesaid, in the sum of five thousand dollars, to be paid to the said Powell, Greenebaum and Foreman, either some or all of them, their executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves jointly and severally, and our respective heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this seventh day of July, A. D. 1879.

Whereas, the above bounden Sherman A. Ricker, has applied in a certain cause wherein said Nathan Powell is complainant, and said Elias Greenebaum, Gerhard Foreman, said Ricker and others are defendants, in the United States Circuit Court, for the Northern District of Illinois, for an order of Court staying the execution of the decree in said last mentioned cause; and whereas, the said United States Circuit Court has granted said stay upon condition that said Sherman A. Ricker shall give bond as in said order provided, and shall stipulate that he will perfect his appeal and file the record for the next term of the Supreme Court of the United States, and submit the same under the twentieth rule on the second day of said term, and consent to an immediate issue of a mandate upon the determination of said appeal from the order and judgment of said Court in a certain suit wherein said Ricker has applied to said Court for leave to file a bill to review the record, proceedings and decree in said above mentioned cause of Powell against Greenebaum, Foreman, Ricker and others, and file a bond executed in the penal sum of five thousand dollars, to Nathan Powell, Elias Greenebaum and Gerhard Foreman, their heirs, executors and administrators, conditioned as next stated.

Now, therefore, the condition of the above obligation is such, that if the above bounden Sherman A. Ricker and W. C. D. Grannis, their executors or administrators, or any of them, shall, and do, well and truly pay or cause to be paid to the said Nathan Powell, Elias Greenebaum, and Gerhard Foreman, their heirs, executors, admin-

istrators or assigns, all costs and damages, including attorney's fees, and expenses, which they, or either of them, may suffer by reason of the stay of the execution of said decree, in case the order and judgment appealed from is not reversed, then the above obligation to be void, otherwise to remain in full force and virtue.

S. A. RICKER, [SEAL.]
W. C. D. GRANNIS. [SEAL.]

Approved.
H. W. BLODGETT, *Judge.*
(Endorsed:)
Filed this 8th day of July, A. D. 1879.
WM. H. BRADLEY, *Clerk.*
Witness my hand, this 7th day of July, A. D 1879.
H. W. BLODGETT, *Judge.*
(Endorsed:)
Filed July 7, 1879.
WM. H. BRADLEY, *Cl'k.*

Afterwards, to wit: on the 8th day of July, A. D. 1879, said complainant, by his solicitor, filed in said clerk's office his appeal bond in said entitled cause, which said bond is in the words and figures following, to wit:

*Appeal Bond.*

Know all men by these presents, that we, Sherman A. Ricker and W. C. D. Grannis, of the county of Cook and State of Illinois, and the Northern District thereof, are held and firmly bound unto Nathan Powell, Elias Greenebaum and Gerhard Foreman, also of the same county and State and district, in the penal sum of one thousand dollars, lawful money of the United States, for the payment of which to said Powell, Greenebaum and Foreman, all, either or any of them, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents.

Witness our hands and seals, this seventh day of July, A. D. 1879.

The condition of the above obligation is such, that whereas the said Nathan Powell, Elias Greenebaum and Gerhard Foreman did, on the seventh day of July, A. D. 1879, in the Circuit Court of the United States, in and for the Northern District of Illinois, and of the July term A. D. 1879 thereof, recover a judgment against the above bounden Sherman A. Ricker, denying the prayer of a certain petition by said Ricker against said Powell and others, filed for leave to file a bill to review a certain decree and proceedings therein mentioned, in a case wherein said Powell was complainant and Ricker, Greenebaum, Foreman and other defendants, theretofore pending in said Court, and dismissing said petition, and for costs of suit: from which said judgment of the said Circuit Court of the United States the said Sherman A. Ricker has prayed for and obtained an appeal to the Supreme Court of the United States.

Now, therefore, if the said Sherman A. Ricker shall duly prosecute his said appeal with effect, and moreover pay the amount of the

judgment, costs, interest and damages rendered against him in case the said judgment shall not be reversed by said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue.

S. A. RICKER, [SEAL.]
W. C. D. GRANNIS. [SEAL.]

Approved.
H. W. BLODGETT, *Judge.*
(Endorsed:)
Filed this 8th day of July, A. D. 1879.
WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit: on the 8th day of September, A. D. 1879, there was filed in said clerk's office a certain stipulation in the words and figures following, to wit:

*Stipulation.*

In United States Circuit Court, Northern District of Illinois.

SHERMAN A. RICKER,
*vs.*
NATHAN POWELL, GERHARD FOREMAN, ELIAS GREENEBAUM, AND OTHERS.

It is hereby stipulated that the following constitutes so much of the Record in the case of Nathan Powell against Samuel J. Walker and others, in chancery, in said court, as is necessary to be copied into the Record hereof, on appeal to the Supreme Court of the United States, and the same may be taken with this stipulation in lieu of the entire Record of that cause, to wit: the original bill in *Powell* v. *Walker* and others, the answer of John G. Rogers, Greenebaum and Foreman, S. A. Ricker, and the amended answer of Greenebaum and Foreman, thereto, the Master's Report, the exceptions of S. A. Ricker to said Master's Report, the orders setting said exceptions for hearing and postponing same, and hearing of said exceptions—the order on the exceptions and report—and the decree in said cause, the allowance of the appeal to the Supreme Court and appeal bond; the certificate of evidence and the depositions of A. M. Pence, Samuel J. Walker, and Elias Greenebaum, the orders of Supreme Court of the United States remanding said cause and affirming decree as corrected, recalling same, and again remanding same.

And it is agreed that replications were duly filed to said answers.

ROSENTHAL & PENCE,
*Sol's for Greenebaum and Foreman.*

There being first added in the transcript of the record to the foregoing matters, the order entered February 8, 1879, modifying decree under ruling of the Supreme Court; the cross-bill of Sherman A. Ricker, filed March 5th, 1875; the order entered May 15, 1879; the order staying the sale, on condition that Ricker enter into bond and stipulation, &c.; the stipulation in the case of Powell *v.* Walker et al., and all other proceedings, orders, or stipulations, had, made,

or entered into in the case of Powell *v.* Walker et al., since February 8, 1879, or in the above entitled cause of Ricker *v.* Powell et al., at any time. We hereby join in the above stipulation. Chicago, September 8th, 1879.

EDW'D S. ISHAM,
JUNIUS MULVEY,
*for Nathan Powell.*
ROSENTHAL & PENCE,
*Att'ys for Greenebaum and Foreman.*
M. W. FULLER,
*Solicitor for Sherman A. Ricker.*

(Endorsed:)
Filed September 8, 1879.
WM. H. BRADLEY, *Clerk.*

Northern District of Illinois, Sct.

I, WILLIAM H. BRADLEY, Clerk of the Circuit Court of the United States for said district, do hereby certify the above and foregoing to be a correct and complete transcript of the record of the proceedings had in said Court in the cause wherein Sherman A. Ricker was the complainant and Nathan Powell et al. were the defendants, as appears from the files and records of said Court, now remaining in my custody and control: said Transcript of Record being made in conformity with the stipulation filed in said Court on the eighth day of September, A. D. 1879, in said entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at my office in Chicago, in said Court, this 16th day of September, A. D. 1879, and of our Independence the 104th year.

[SEAL.]

WM. H. BRADLEY, *Cl'k.*

In the Supreme Court of the United States, October term, 1879:

SHERMAN A. RICKER, *Appellant,*
*vs.*
NATHAN POWELL ET AL., *Appellees.*

It is hereby stipulated by the parties hereto, to submit said cause to said Court for hearing and disposition under the twentieth rule of said Court, upon printed arguments, to be filed on or before the 2nd day of the October term, A. D. 1879, of said Court. This stipulation shall not be considered as depriving said appellees, or either of them, from moving to dismiss said appeal out of the Supreme Court. And it is further stipulated that a mandate may issue immediately out of said Supreme Court, upon the determination of said appeal by said Court.

Chicago, July 7, 1879.

M. W. FULLER,
*Of Counsel for Ricker, Appellant.*
ROSENTHAL & PENCE,
*For Greenebaum & Foreman.*
EDW'D S. ISHAM,
*Of Counsel for Nathan Powell.*

Filed October —, 1879.

IN THE

# SUPREME COURT OF THE UNITED STATES.

*OCTOBER TERM, A. D. 1879.*

SHERMAN A. RICKER,
*Appellant,*

*vs.*

NATHAN POWELL,
ELIAS GREENEBAUM, AND
GERHARD FOREMAN,
*Appellees.*

STATEMENT, ASSIGNMENT OF ERRORS,
AND
**BRIEF FOR APPELLANT.**

**MELVILLE W. FULLER,**
*Of Counsel for Appellant.*

CHICAGO:
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1879.

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AND
GERHARD FOREMAN,
*Appellees.*

## STATEMENT, ASSIGNMENT OF ERRORS,
AND
## BRIEF FOR APPELLANT.

MAY IT PLEASE YOUR HONORS:

This is an appeal from an order of the Circuit Court, dismissing with costs the petition of the appellant, Sherman A. Ricker, for leave to file a bill of review, or in that nature, for the revision of a certain decree rendered in the cause of Nathan Powell against Samuel J. Walker, Ricker and others, in said Court, on the chancery side thereof, and refusing to allow said bill to be filed.

## STATEMENT.

By deed, dated April 1st, and recorded May 25th, 1869, Nathan Powell conveyed to H. H. Walker, forty acres of land in the city of Chicago, upon which Walker gave to Powell a mortgage dated April 8th, and recorded May 25th.

On the 12th day of April, 1870, H. H. Walker conveyed the land, by quit-claim, to Samuel J. Walker, the deed being filed for record Sept. 19th, 1870.

Sept. 12, 1870, Powell released one-half of the land from the lien of the mortgage.

Sept. 30, 1870, Samuel J. subdivided the forty acres into blocks, subsequently conveyed to various persons. The Powell mortgage after release of one-half, rested upon blocks 13, 14, 15, 16, 17 and 18.

The questions arising upon the record, relate to blocks 14 and 16 only, and the title as to them stands thus:

*Block* 14.

Warranty Deed, *Samuel J. Walker*, to Messrs. *Coolbaugh & Powers*, of block 14 (*inter alia*), dated July 1, 1872, and *recorded* Dec. 7, 1872.

Quit-claim of *Coolbaugh & Powers* to *Samuel J. Walker*, of block 14, dated Feb. 23, 1873, and recorded April 3, 1873.

Warranty Deed of *Samuel J. Walker* to *Sherman A. Ricker*, of block 14, dated Feb. 25, 1873, and recorded April 5, 1873.

*Block* 16.

Warranty Deed, *Samuel J. Walker* to Messrs. *Coolbaugh & Powers*, of block 16 (and other blocks), dated July 1, 1872, recorded Dec. 7, 1872.

Warranty Deed of *Samuel J. Walker* to *John D. Kinney*, of block 16, dated Nov. 25, 1872, *recorded* Dec. 2, 1872.

*Trust Deed* of *John D. Kinney* to *John G. Rogers*, of block 16, dated Nov. 25, 1872, and *recorded October* 23, 1873.

Quit-claim of *Coolbaugh & Powers* to *Samuel J. Walker*, of block 16, dated Feb. 25, 1874, and recorded April 15, 1874.

Quit-claim of *John D. Kinney* to *Henry H. Walker*, of same, dated March 6, 1874, recorded March 16, 1874.

Quit-claim of *Samuel J.* to *Henry H. Walker*, of same, dated April 11, 1874, and recorded April 15, 1874.

*Contract of Samuel J.* and *Henry H. Walker with Emerson G. Orvis*, dated February 26, 1874, and recorded same day, for conveyance of south 100 feet of block 16.

Warranty Deed of south 100 feet, *Henry H. Walker to Orvis*, dated February 26, 1874, and recorded April 9, 1874.

*Receipt* of *Samuel J. Walker* to *Wm. Flanagan*, of payment on account of purchase of north 200 feet of block 16, dated February 27, 1874, and recorded April 4, 1874.

Warranty Deed of *Henry H. Walker* to *Flanagan*, of said north 200 feet, dated February 27, 1874, and recorded April 15, 1874.

July 23d, 1874, Nathan Powell filed his Bill of Complaint in the Circuit Court of the United States for the Northern District of Illinois, against Henry H. and Samuel J. Walker and others, for the foreclosure of the mortgage in question.

To this bill Powell made all persons who claimed to be interested in the property, parties defendant; but the bill contained no averments as to the subdivision or the alienations subsequent to his mortgage, and sought no relief except as against the entire property unreleased, and *no cross-bill* was filed *by either of the defendants, seeking as be-*

*tween themselves the application of the rule of the inverse order of the alienation.*

Nov. 5th, 1874, the cause was referred to the Master in Chancery "to take proofs herein, and to report the same to the court." March 17th, 1875, the Master's report was filed, whereby he not only reported the proofs to the court, but set forth his conclusions as to the order in which the property should be sold.

As this report *now* appears on page — of the printed record, the order of sale as found by the Master is as follows: 1. The north 201 feet of block 16. 2. The south 100 feet of block 16. 3. Block 14, and then other blocks; but it is evident that the report as originally made, recommended the sale of block 14 *first*, as on the 3d day of April, 1875, Sherman A. Ricker, then one of the defendants in that case, filed his *exceptions* to said report, objecting that "*First*: Said report finds that block fourteen (14), Packer's subdivision &c., owned by said Sherman A. Ricker, is first liable to sale under said mortgage, whereas it should find that said lot is not first liable. *Second*: Said report does not find that block sixteen (16), is liable to sale before block fourteen (14), whereas it should find that said block sixteen (16), is so liable to sale before said block fourteen (14). *Third*: Said report does not find that the (north) 201 feet of block sixteen (16), is liable to sale before said block fourteen (14), whereas it should so find. *Fourth:* Said report does not find that the (south) 100 feet of said block sixteen (16), is liable to sale before said block fourteen (14), whereas it should so find."—(P. rec. p. 54)

These exceptions were heard upon the 12th day of May, A. D. 1875, and upon the 15th of May the court entered its order *sustaining* "said exceptions, so far as they relate to block fourteen therein mentioned, which was by said Master *found to be first liable to sale under this proceeding;*

and it is therefore ordered that said report be reformed by providing that block sixteen (16) shall *first be sold* in the way mentioned in said report, and after that block fourteen (14), and that *then* the order of sale as indicated in said report shall be followed." (P. rec. p. 55)

It is apparent that the report was thereupon amended, in compliance with this order, by making the amendments on the original report, and this explains the fact that the exceptions are directed against what no longer appears.

On the 5th day of June, A. D. 1875, the decree was entered, which did *not* pursue the Court's order of May 15th, and the Master's report as amended, but prescribed the following order of sale: 1. The north 201 feet of block 16, *excepting and reserving the estate and interest of John G. Rogers, trustee, and Greenebaum & Foreman, cestui que trust.* 2. The south 100 feet of block sixteen. 3. Block fourteen. 4. *The interest of Rogers, and Greenebaum and Foreman*, in and to the north 201 feet of block sixteen, heretofore excepted; and then the other blocks. (P. rec. p. 57)

Of this change in the decree, from the order designated in the Master's report, pursuant to the order of the Court of May 15, by the insertion of the exception of the Rogers title, and the direction for its sale as a separate estate, after block 14, Sherman A. Ricker and his Counsel had, *in fact, no notice whatever, and no knowledge or information thereof, until January*, 1878, as will be hereinafter more fully set forth; and consequently Ricker, relying that the two parts of Block sixteen were to be sold prior to his block, free of incumbrance, as decreed May 15th, did not appeal.

Orvis, however, who claimed the south 100 feet of block 16, prayed and perfected an appeal, which was made a supersedeas Aug. 16th, 1875, and the operation

of the decree being thus suspended, the attention of Ricker and his counsel was not drawn to the change which had been made.

This change rendered the sale of the north 201 feet of block 16 merely a sale of the equity, or the interest over and above the Rogers trust deed, and diminished the value to the extent of that incumbrance.

This trust deed was recorded October 23d, 1873, and Orvis did not get his title until 1874, and then of Walker.

He therefore could not upon his appeal successfully object to his parcel being subjected to sale before the Rogers interest, if the latter was to be sold separately at all.

The cause being thus transferred to the Supreme Court of the United States, and therein entered at the October Term, 1875, under the title of *Orvis* v. *Powell*, was nearly reached for hearing early in May, 1878, but was not heard (the Court pausing at the then docket No. 287, and *Orvis* v. *Powell* being 288), until the fall of that year. The record was in the meantime printed, and reached Ricker's counsel about January, 1878, and this was their first information of the change in question.

The Court decided the decree to be erroneous in not allowing the right of redemption, but that it was otherwise correct *so far as Orvis was concerned*, and that no error could be urged by any party but Orvis, because he alone prosecuted an appeal. (See opinion Chicago Legal News, Vol. XI, p. 105, Dec. 21, 1878.)

The decree was otherwise affirmed but the cause remanded with directions to amend, by allowing redemption.

This mandate having come down, the decree was *re-entered* as amended, Feb. 8th, 1879, and on the 3d of March Ricker filed his petition and affidavits, and proposed bill of review, which, upon said papers, he applied to the

Court for leave to file. Pending this application, the mandate was recalled and the cause re-argued, and the same conclusion having been reached and announced May 5th, the second mandate was filed May 15th, and an order entered for the Master to proceed with the sale in the order prescribed by the original decree.

May 21, 1879, Mr. Ricker filed a second petition for leave to file a bill of review, or in that nature, accompanied by the affidavits and papers used upon the first application and others, and by the bill of review proposed to be filed.

The Court denied the prayer of the petition, dismissed the same, and gave judgment for costs, and the petitioner, Ricker, prayed the pending appeal therefrom to this Court, which was granted, an order being also entered in the original cause, staying the sale, upon Mr. Ricker giving bond, and stipulating to submit this cause upon the first day of the term.

The proposed bill of review is framed in a double aspect, and seeks the modification of the original decree upon the grounds of errors of law apparent; accident and surprise, and newly discovered evidence.

It avers the purchase by Mr. Ricker of block 14 for consideration, paid in cash, in February, 1873, and the erection thereon by him in the spring and summer of that year of improvements costing over $80,000. It sets forth *in extenso* the state of the title, and the proceedings, Master's report, exceptions, order and decree. It then states the grounds upon which relief is sought.

The affidavits fully establish the facts in relation to the hearing of the exceptions to the Master's report, the order of the court thereon, of May 15th, *the preparation of the decree* in accordance with the report, as reformed, and its submission, as so prepared, to Mr. Smith, the solicitor, who had charge of the case on Mr. Ricker's

behalf, and his assent thereto, in its then condition. Mr. Smith's affidavit is explicit as to his examination of the report as amended and confirmed, and of the original draft of the decree, and he testifies, among other things, that he "was so far satisfied with the same, that he did not think it advisable for the said defendant, Ricker, to pray an appeal therefrom, and accordingly no appeal therefrom was prayed by said Ricker."

Specific averments are made of want of notice, knowledge or information of the change in the decree by the interlineation of the exception of the estate, &c., created by the Rogers trust deed, and the direction that the title so excepted should be sold fourth, and *after* block 14, are fully detailed, and that discovery thereof was not made until December, 1877, or January, 1878, when the printed record in *Orvis* v. *Powell* came from the Supreme Court, this being *more than two years* after the entry of the decree.

The newly discovered evidence is embodied in the affidavits of Messrs. Samuel J. Walker and A. C. Reed, and is to this effect:

1. That Greenebaum & Foreman in fact obtained the Kinney note in October, 1873, more than six months after Ricker got his title, for an over-due check of $7,500 and $2,000 of Samuel J. Walker, at which time Walker owned *the interest and estate* created by the Rogers trust deed, ordered by this decree to be sold *after* Ricker's block—block 14.

[The rule of the inverse order is based upon selling *first* what the original mortgagor owns, and Samuel J. Walker occupied the position of original mortgagor, as is pointed out in the second opinion in *Orvis* v. *Powell*. Hence, when Ricker recorded *his* title to block 14, April 5, 1873, Walker still owned this estate and interest, and did so until October. So far as Ricker is concerned, this estate and interest should be sold first. The record in

*Powell* v. *Walker and others*, shows upon its face that the Rogers trust deed was not recorded until *October*, 1873, and I insist that this creates the *presumption* that it was *then* that Greenebaum & Foreman got the Kinney note of Walker, and that therefore the Court erred as matter of law apparent, in decreeing the sale of the Rogers title *after* instead of *before* block 14; but if this be not so, then *proof* that Greenebaum & Foreman got the Kinney note in the fall of 1873, *in fact*, becomes material.]

2. That Walker was *insolvent* when Greenebaum & Foreman took the Kinney note of him, *to their knowledge*, and unable to respond upon his warranties.

[Under such circumstances, Ricker was entitled to take up the Powell mortgage, and demand an assignment of the Kinney note upon the principle of subrogation, and Greenebaum & Foreman took subject to that right.]

3. That Kinney knew that block 16 had been conveyed to Messrs. Coolbaugh and Powers, by the deed of July 1, 1872, which was not recorded until Dec. 7, 1872, before he obtained his conveyance from Walker, in November, 1872, and took the deed upon the agreement with Walker that the latter would procure the conveyance of Coolbaugh & Powers, and that Greenebaum & Foreman had notice of these facts.

Hence the deed to Kinney of November, 1872, was subject to the title in Coolbaugh & Powers of July, 1872, and Coolbaugh & Powers did not convey back until the spring of 1874, while Ricker got his title to block 14 from Walker in the spring of 1873, at which time, also, Walker obtained the deed of that block from Coolbaugh & Powers.

And it may be further remarked, that if *Kinney*, in November, 1872, had *actual knowledge* of the deed of July, 1872, to Coolbaugh & Powers, though it had not then

been recorded, Greenbaum & Foreman are bound, because that deed was recorded December 7, 1872, before they took, and that, coupled with Kinney's actual knowledge, places them in the same position as if the deed had been recorded before any conveyance to Kinney at all. See opinion by Chief Justice Shaw, *Flynt* v. *Arnold*, 2 Metcalf, 619.

4. That Kinney gave his note originally, to be applied in extinguishment of the Powell mortgage, by agreement with Walker, of which agreement Greenebaum & Foreman had knowledge. [This was equivalent to an agreement on Kinney's part to pay the Powell mortgage to the extent of the note, which was purposely fixed at the then principul sum due on that mortgage, to-wit: $12,000. Of course, if Greenebaum & Foreman took without notice, there is nothing in this, but if they knew of the arrangement, they are bound by it so far as to preclude selling any *other* part of the property prior to this. In other words, this disposes of the inverse order rule as to this block.]

These facts are all *positively* averred in the affidavits; and from those of Mr. Walker and of Messrs. Ricker, Smith and Fuller, it appears that the discovery of this evidence was not made until just prior to the application for leave to file the bill of review. Whether discovery might or should have been made before, and whether Greenebaum & Foremon are entitled to urge that objection, are matters to be considered in the course of this argument.

## ASSIGNMENT OF ERRORS.

I.

*The Court below erred in dismissing appellant's petition for leave to file his bill of review, with costs.*

II.

*The Court below erred in refusing to allow appellant to file his bill of review.*

III.

*The Court below erred in not decreeing upon the bill of review, a revision and modification of the original decree.*

## POINTS AND ARGUMENT.

I.

*The Court below erred in not permitting the bill of review to be filed, and in dismissing appellant's petition for leave, with costs, if there were error of law apparent or error on the ground of fraud, accident, or surprise, or of newly discovered evidence or probable cause to conclude that serious error had intervened.*

A bill of review can be filed as of right for error of law apparent, and a bill in the nature of a bill of review, may be filed as of right, which seeks to impeach a decree for fraud, accident or surprise, and so of a bill of review,

or in its nature, grounded upon error of law apparent *and* fraud, accident or surprise, *or* error of law apparent *and* error on newly discovered evidence.

It is only when the bill of review is founded on newly discovered evidence *alone* that leave to file it must be applied for.

*Griggs* v. *Gear*, 3 Gilman (Illinois), 2, and authorities cited.

The case of *Griggs v. Gear* is a leading one, and fully discusses the subject.

*Elliott* v. *Balcom*, 11 Gray 286.
*Perry* v. *Phillips*, 17 Vesey, 178.
*Gould* v. *Tancred*, 2 Atkyns, 534.
*Mitford & Tyler's* Eq. Pl. and Pr. 181.
Story's Eq. Pl. § 405.

In the case at bar, the bill embraces error of law apparent and fraud, accident, or surprise as well as newly discovered evidence, and could therefore have been filed *without leave.*

It may be said that the leave in such case should not be asked, because it *need* not be. This may be true, but does not justify the Court in refusing to allow that to which the applicant is entitled without asking.

If, therefore, substantial error is apparent upon the face of the record proper, the Court below erred in dismissing appellant's petition, and the judgment should be reversed. In other words, the case may be treated as if the bill had been filed and dismissed upon demurrer.

And in so far as the bill is to be considered as an original bill, impeaching the decree upon the ground of fraud, accident or surprise, the Court below erred in its action, and its judgment should be reversed, if there be *probable cause* for the relief sought by appellant.

I conceive that under the circumstances appellant

should not be held obliged to make a case upon these papers beyond a reasonable doubt. It is enough to entitle him to proceed upon his bill that the facts stated are sufficient to justify the interposition of the court, and this is so, if probable cause be shown.

Upon the ground of newly discovered evidence, the Circuit Court exercises discretion, but this is a legal discretion, and if the appellant clearly brought himself within the rules in reference to applications upon this ground, then the Court below erred in its action, and its judgment should be reversed.

And besides, inasmuch as the bill embraced *other* grounds of relief than that of newly discovered evidence, it should have been allowed to be filed, and the latter ground could only properly have been disposed of by a final decree upon the merits.

## II.

*There is error of law apparent.*

The record examinable upon a bill of review in this country, embraces the pleadings and proceedings, including orders, Master's report, &c., together constituting what is generally regarded as the record in the cause, and necessary to be examined in order to a proper understanding of the decree itself.

*Putnam* v. *Day*, 22 Wallace, 66.

*First.* There is error apparent in ordering the sale of Block fourteen (14) before that of the estate, right, title and interest of John G. Rogers and Greenebaum & Foreman in and to the North two hundred and one feet of Block sixteen, inasmuch as it appears upon the face of the record that this title of Rogers and Greenebaum & Foreman, should be sold before Block fourteen.

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Upon the ground of newly discovered evidence, the Circuit Court exercises discretion, but this is a legal discretion, and if the appellant clearly brought himself within the rules in reference to applications upon this ground, then the Court below erred in its action, and its judgment should be reversed.

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The deed of Coolbaugh & Powers to Samuel J. Walker, of Block fourteen, was dated Feb. 25, 1873, and recorded April 3, 1873; and the deed from Walker to Sherman A. Ricker was dated Feb. 25, and recorded April 5, 1873.

The deed of Walker to Kinney, of Block sixteen, was dated Nov. 25, 1872, and recorded Dec. 2; and the trust deed of Kinney to John G. Rogers, on Block 16, was dated Nov. 25th, 1872, and recorded October 23d, 1873.

These facts appear in the pleadings, proceedings and decree, and also in the abstract of title, which is agreed by stipulation to be correct, and to be used in lieu of original documents, as appears from the stipulation and the Master's report. No resort to the proofs generally is therefore made to make out these facts, nor is the ground of review under consideration that the Court decided wrong on a question of fact, or that the matters decreed are contrary to the proofs in the cause. Taking the facts to be as they are stated to be *on the face of the record proper*, the Court has erred in point of law.

Sometimes authorities use the language "on the face of the decree," but this is incorrect in the United States Courts, as the decree in those courts omits by rule the statement of the facts embodied in the decree in England. *Putnam* v. *Day*, *supra*.

*Mr. Rogers*, in his answer, denies any knowledge of any claim in the mortgaged property, and says, "he supposes that he may be a trustee or successor in trust in some deed or deeds made by some owner or claimant of said land, for the use and benefit of some other person or persons; and, if so, he leaves the *cestui que trust* to assert his or their right. *He has no knowledge of such trust*—has never been advised thereof, so far as he knows or believes, and has never accepted it." [P. Rec. p. 29].

Messrs. *Greenebaum & Foreman*, in their amended an-

swer, say: "That said John D. Kinney, being so the owner of block sixteen (16), and in order *to secure a part of the purchase money* therefor, executed his certain promissory note, bearing date November 25th, A. D. 1872, being for the sum of twelve thousand dollars ($12,000), due on or before three years after date, with interest at eight per cent. per annum, and so being the owner of said block in order to secure said purchase money so evidenced by said note, executed his certain trust deed unto said John G. Rogers, as trustee, and thereby conveyed unto him by such trust deed, said block sixteen (16), which said trust deed being duly executed by said Kinney, was filed for record in the recorder's office of Cook county, Illinois, on *the 23d day of October*, A. D. 1873, and was recorded in said office, in book 266 of records, at page 453." This answer claims that block 16 should be sold after ~~prior to~~ other property, but does *not* claim that the title, estate and interest under the Rogers trust deed should be so sold. [P. Rec. p. 35]

The decree orders the sale as follows:

"First. The north two hundred and one (201) feet of block sixteen in said subdivision, excepting and reserving therefrom all the estate, right, title, interest, claim, property, and demand of the said John G. Rogers, and of the said Elias Greenebaum and Gerhard Foreman therein, under and by virtue of the certain deed of trust executed by John D. Kinney to said John G. Rogers, bearing date the twenty-fifth day of November, A. D. 1872, and filed for record in the recorder's office of Cook county, Illinois, on the twenty-third day of October, A. D. 1873, and recorded therein in book 266, on page 453, and subject thereto.

*Second.* The South one hundred (100) feet of said block sixteen.

*Third.* Block fourteen (14) in said subdivision.

*Fourth.* All the said estate, right, title, interest, claim,

property and demand of the said John G. Rogers and of the said Elias Greenebaum & Gerhard Foreman of, in and to said north two hundred and one (201) feet of said block sixteen (16), under and by virtue of said deed of trust so as aforesaid executed by said John D. Kinney to said John G. Rogers, hereinbefore excepted and reserved" [P. Rec. p~~277~~ 58].

It is respectfully submitted that the Court below clearly erred in decreeing the sale of block 14, before the sale of this Rogers estate, title and interest.

The deed to Ricker of block 14, was recorded April, 1873. The trust deed to Rogers of block 16 was recorded October, 1873.

The recording of this trust deed created a *presumption* that Samuel J. Walker, who sold block 16 to Kinney, and took Kinney's note for twelve thousand dollars purchase money secured by this trust deed, held said note and trust deed *until* October, 1873, and *hence* in April, 1873, when the deed to Ricker of block 14 was recorded, this interest of Walker would be first to be sold. The rule of the inverse order is based upon selling *first* what the original mortgagor owns, and Samuel J. Walker, in effect, occupied the position of the original mortgagor, as is held by this Court in the second opinion in *Orvis* v. *Powell*. As, therefore, Walker owned this Rogers estate, title and interest, for months *after* Ricker recorded his title to block 14, this estate, title and interest, must be sold *before* and not *after* block 14.

If there had been a decree of foreclosure of the Powell mortgage in 1873, after April and before October, the Court would have directed the sale of the Rogers estate and title before block 14, and just as this would have been so in the summer of 1873, it remained as to any one who purchased that estate and interest *of Samuel J. Walker* after the record of the deed to Ricker, and this is the position of Greenebaum & Foreman, who are pre-

sumed to have purchased at the time of the record of the trust deed, namely, October, 1873.

The newly discovered evidence establishes that this presumption is correct, as matter of fact, and this explains why Greenebaum & Foreman, to whom it belonged to rebut the presumption, if they could, did not do so, because they could not.

To this it is answered in argument that the record does not show *when* Greenebaum & Foreman purchased and that the *presumption* in reference to a promissory note, is that its indorsement is presumed to have been made at the day *the note was made*, but it is not believed that there is any ground for any more definite presumption than that the indorsement was made *before maturity*, which is all that is ordinarily essential to the circulation of paper without obstruction (2 Parsons on Notes, p. 9) and while cases maybe found assuming the doctrine contended for, it has not so been determined in any well considered case where the point was essential to the decision.

But even were this so, the presumption arising *from the record of the trust deed* securing the note, is *decisive* until rebutted.

Furthermore, it cannot be claimed that it is merely a promissory note, which Greenebaum & Foreman bought, for they insist that they purchased more, namely *a title* to the real estate described in the deed to Rogers, and *this* they purchased from Walker, who had the equitable title to the lot, Rogers being only nominally vested therewith. They are seeking to protect *this title* purchased from Walker, and it is *this title* and not the note which is directed to be sold by the decree.

Where the question arises as it does here, and relates to the proper order of sale, based upon a determination of the equities between the purchasers of different parcels of real estate, each purchaser has the equitable right before his property is sold, on a prior encumbrance to

have all the interest of the original encumbrancer, from whom he derives title, sold, which is outstanding when his purchase is made and perfected, and hence an estate, title and interest outstanding in Samuel J. Walker, at the time Ricker's deed was recorded, must be sold before the estate, title and interest acquired by Ricker.

And here let the Court observe that Ricker paid *in full* in February, 1873, as is alleged in the bill of review, and as appears from his answer, and as is to be presumed as of April 5, 1873, when his deed was recorded, while Kinney did *not* pay in full, as is admitted by Greenebaum & Foreman them-elves, in their answer, in which they state that Kinney gave his promissory note for twelve thousand dollars *for the purchase money*. So long, therefore, at least, as that note remained *unnegotiated*, Kinney did not occupy the position of a *bona fide* purchaser of block sixteen, as between himself and Ricker.

The cases of *Brown* v. *Welch*, 18 Illinois, 343, and *Mosier* v. *Knox College*, 32 Illinois, 153, pursuing the rule in *Boone* v. *Chiles*, 10 Peters, 211, hold that it is essential that purchasers to be protected, must "have *actually* paid for the land. *It is not sufficient even that they may have secured the payment of the purchase money. They must have paid it, in fact*, before they had notice of the complainant's prior equitable title." And this in controversies between different claimants to the same piece of land. *A fortiori*, must this be the rule where the question is simply as to which of two parcels shall be called upon to respond to a prior encumbrance on both.

In *Baldwin* v. *Sager*, 70 Illinois, 504, it is held that if a party purchases land for full value, without notice of any lien, and pays a part of the purchase money, and before paying the balance, is notified of such lien, the lien can be enforced to the extent of the unpaid purchase money, if the notes given therefor *have not been negotiated.*

At the time the deed to Ricker was recorded, the

Kinney note had *not been negotiated* but was held by Samuel J. Walker, and, therefore, Ricker had the right to have this unpaid purchase money applied on the Powell Mortgage, or in other words, to have the Rogers estate, title and interest, sold before block 14, and Greenbaum and Foreman were charged with notice of this right and took subject to it because they acquired their interest after the deed to Ricker was recorded.

In examining the title, Greenebaum & Foreman were in law obliged, so far as the Powell mortgage was concerned, to investigate that of the other blocks, as well as block 16. It is the settled rule that "where the record discloses an incumbrance on property of which a party is taking a conveyance, and also discloses the further fact that the incumbrance rests on other property, and on an examination directed *to such other property*, it becomes apparent that a conveyance of the latter has been made, which creates an equitable right *to throw the burden of the incumbrance on the first property*, the purchaser will be *presumed* to have made such examination, and will be regarded as *constructively notified of such equity.*"

*Hunt v. Mansfield*, 31 Conn. 488.
*Brown v. Simmons*, 44 N. H. 475, 481.
*Iglehart v. Crane & Wesson*, 42 Illinois, 269.

Hence, in October, 1873, Greenebaum and Foreman were charged with notice that the Rogers estate, title and interest was liable upon the Powell mortgage before block 14, and this equitable right of Ricker they could not divest by their purchase so made with notice. Taking with notice, they simply stepped into Walker's shoes. Having knowingly so acted, they cannot at their own volition displace or impair the equity of another.

*Iglehart v. Crane*, *supra*, p. 265.

It will be remembered that Walker's deed of block 16 to Kinney was dated Nov. 25th, 1872, and recorded Dec.

2. And in March, 1874, Kinney conveyed back to the Walkers.

Now it is argued that if Kinney had *not* re-conveyed, then "as between Kinney and Ricker, Kinney would have had the right to have Ricker's block 14, first subjected to the payment of the Powell mortgage, because the deed to him was first in point of time. And if he had the right, so do his privies in estate. Greenebaum & Foreman are his privies in estate, claiming through Rogers, the trustee under Kinney."

But this position is entirely untenable. As between Kinney and Ricker, in the case supposed, that is, if Kinney had retained the interest acquired by the deed from Walker of Nov. 1872, (and had had no notice of the prior deed to Coolbaugh & Powers) the *first* interest to be sold, would have been the estate, title and interest of Rogers in block 16 created by Kinney's trust deed, if the note had not been negotiated, as it was not, prior to the record of the deed to Ricker of block 14, then block 14, and then Kinney's interest in block 16. At all events, Ricker could have insisted upon a decree which would have given him the benefit of the unpaid purchase money. The assertion that Greenebaum & Foreman are privies in estate ignores a vital link in the chain which creates that successive relationship which constitutes "privity." That link is *Samuel J. Walker.*

It was said by counsel in the Court below, that "it must be admitted that the mortgagee, and those claiming under him, are purchasers *within the meaning of the recording law.*" (1 Jones on Mortgages, § 458.) But the trust deed to Rogers was no more than a mortgage by Kinney to Samuel J. Walker, and the legal title which passed from Walker to Kinney by the deed of Nov. 25, 1872, passed from Kinney back to Walker, or to Rogers for Walker, by the trust deed of the same date. *Walker* then

occupies the position of purchaser, and Greenebaum & Foreman bought of him. And buying as they did of *Walker*, "the *priority of liability* for the original mortgage became re-attached," as this Court specifically decides in the second opinion in *Orvis* v. *Powell.*

The adverse argument of counsel turns upon the fallacy that Greenebaum and Foreman stand in *Kinney's* shoes and not Walker's, and that if Kinney held free from equities, Greenebaum and Foreman did so *even although they* knew of their existence against the property.

It is true that the *bona fide* purchase of an estate for valuable consideration, purges away the equity from the estate in the hands of all persons who may claim title under it, but this is subject *to the exception of the original* party. If the estate becomes revested in him, the original equity will attach to it, in his hands.—1 *Story's Eq. Jur.*, § 410.

And so this Court holds in *Orvis* v. *Powell.*

Nothing can be clearer than that so long as Walker held the Kinney note *unnegotiated*, the estate, title and interest, which secured it, belonged to him and was applicable upon the Powell mortgage.

If the note had been negotiated between Dec. 2, 1872, and April 5th, 1873—that is, between the record of the deed to Kinney and of that to Ricker, *then* Greenebaum and Foreman might claim that they took without notice, (in the absence of proof upon that subject), but acquiring the note of Walker, as they did, in the fall of 1873, their equities are inferior to those of Ricker.

And so far as Kinney is concerned, if the sale of the estate, title and interest created by the Rogers trust deed, worked any legal injury to him, it would constitute a defense to the note, for the rule is that "where a vendor of real estate agrees to remove all existing incumbrances upon the premises, a failure to remove them will constitute

a defense in equity against the notes given for the purchase money to the extent of the incumbrance; and such defense will be good, even against the assignee of the notes, *before maturity*, he having notice thereof when he received them."

*Tenney* v. *Hemenway*, 53 Ill., 97.

And Greenebaum & Foreman had notice as we have seen.

But in fact, Kinney could not be injured in any respect. If the title under the Rogers trust deed is to be sold *as such* at all, and this is the decree as it stands, then, whether it is sold *third* as is contended, or *fourth*, as the decree has it, could make no difference to Kinney *in principle*. Whatever it sold for, would be so much applicable to the Powell mortgage, and the Kinney note would be extinguished to the same extent.

It is a rule of property in Illinois, that the assignee of promissory notes secured by a mortgage, is subject when he seeks foreclosure, to any equitable defenses existing against the mortgage in the hands of the mortgagee, and this, regardless of the fact that the assignee may have purchased the notes in good faith, and before their maturity.

*Olds* v. *Cummings*, 31 Ill. 188.

This rule is reiterated as late as Feb. 22nd, 1879, in the case of *Colehour* v. *Savings Institution*, wherein it is restricted to all equities arising out of the note and mortgage transaction itself. (Ill. Synoptical Reporter, p. 177.)

In *Carpenter* v. *Longan*, 16 Wall. 271, this Court announces the opposite rule, but would of course feel constrained to apply the rule of property prevailing in Illinois where the land lies, as is remarked in the first opinion in *Orvis* v. *Powell*.

But it is not important to discuss this. Inasmuch as

Greenebaum & Foreman took the note *after* the record of the deed to Ricker they took *with notice* and subject to the equities, even within the rule laid down in *Carpenter* v. *Longan*.

The Case of *Niles* v. *Harmon*, 80 Ill., 396, which will be cited by counsel for appellees, is deserving of close examination, as the distinctions between that case and the one at bar, seem to me to absolutely *demonstrate* the correctness of the position taken on Ricker's behalf. Indeed, I think the opinion *in terms* holds the applicable rule to be that for which I contend. The case is thus:

Frame conveyed two hundred acres to Virden, who gave a mortgage back, and afterwards conveyed in parcels, by warranty deeds—one parcel to Kussell, who mortgaged back to secure the purchase money; another to Hartshorn, who mortgaged back to secure the purchase money; another to Niles, who mortgaged back to secure the purchase money.

One Harmon became the owner, before maturity, of the notes given by Kussell to Virden, and filed a bill to foreclose Kussell's mortgage Frame, Virden, Kussell, Niles and Hartshorn, were all made parties defendant, and *cross-bills were filed for the foreclosure of all the mortgages.*

It was contended that the Kussell parcel should be sold first, and the amount be applied on the original mortgage, and *credited on Kussell's mortgage*, as a payment of his own debt. The Court held that this would be proper were it not that the Kussell notes had been transferred to Harmon. It is said (p. 401): "The notes being outstanding in the hands of a *bona fide* purchaser before maturity, places Kussell in the same condition, as respects this question, *as if he had paid for his land at the time of the purchase*, and there exists the same necessity as there would in the latter case, that, in order to protect him from injury, the lands should be sold in the inverse order of their

alienation. The mode of adjustment suggested by counsel for plaintiffs in error would be an entirely correct one, were Kussell's notes *still in the hands of Virden untransfered."*

Now, in *Niles* v. *Harmon*, it does not appear but that Harmon got the Kussell notes *before* the sales to Niles & Hartshorn. The presumption from the statement of the case is that he did.

*In the case at bar, it does appear* that Greenebaum & Foreman got the Kinney note *after* the sale to Ricker was made.

In *Niles* v. *Harmon*, it does not appear but that th[e] mortgage given by Kussell, to secure the notes which Harmon took, was recorded *before* the sales to Niles & Hartshorn, and *before* the deeds of Virden to them had been recorded. From the statement of the case, the presumption is that it was.

*In the case at bar, it does appear* that the trust deed to Rogers was not recorded until months *after* the sale was made to Ricker and his deed recorded.

In *Niles* v. *Harmon*, it appears that neither Kussell nor Niles nor Hartshorn *had paid in full.*

*In the case at bar*, it appears that Ricker *had paid in full* to the knowledge of Greenebaum and Foreman months before the Kinney notes went out of Walker's hands, and Greenebaum and Foreman knew the Kinney note was given for *purchase money.*

In *Niles* v. *Harmon*, it does not appear that Virden was insolvent and unable to respond upon his warranties, when Harmon took the Kinney notes.

*In the case at bar*, it does appear that Walker was insolvent, and unable to respond when Greenebaum & Foreman took the Kinney note. This last fact appears from

the newly discovered evidence, but the other facts in the case at bar either actually appear *from the record*, or are to be presumed therefrom.

In *Niles* v. *Harmon*, it is declared that the Kussell notes would have been applicable to the Frame mortgage, if they had been in the hands of *Virden* (the second mortgagor) *untransferred.*

*In the case at bar*, the Kinney note *was* in Walker's hands, untransferred, *for months after* the sale and conveyance and record of the conveyance to Ricker, and was taken by Greenebaum & Foreman under those circumstances. They took, therefore, subject to the equitable right in Ricker to demand that the Powell mortgage should be paid out of block 16, to the extent of the unpaid purchase money, to-wit: the Kinney note, because said note remained in Walker's hands *unnegotiated at the time Ricker paid for his block in full.*

Upon this point *Baldwin* v. *Sager*, 70 Ill., 504, is decisive.

As has already been observed, in *Niles* v. *Harmon*, the subsequent purchasers and second mortgagors, by cross-bills set up the grounds relied on for relief, as between themselves, and in fact, the original mortgagee, Frame, sought foreclosure by cross-bill. It was not attempted in the decree to sell upon the *original* mortgage the various estates created by the several second mortgages, *notwithstanding* the original bill was for the foreclosure, not of the original, but of a second mortgage. All that was determined as to the sale was the order in which each distinct parcel should be sold upon the original mortgage, and so sold free and clear of *subsequent* encumbrances. This transferred the contention to the *proceeds*, where it belonged.

And in the case at bar, with all deference to the learned

judge of the District Court, it would seem that block 16 should have been sold without reference to the subsequent encumbrance.

If, then, Greenebaum & Foreman had equities as against block 14 (which I deny), they could have been adjusted by subrogating Greenebaum & Foreman to the Powell mortgage.

In other words, if the sale of block 16 satisfied the Powell mortgage, still it could have been kept alive in favor of any one entitled to claim by way of subroga tion.

If in fact it took the proceeds of the sale of both blocks to pay Powell, then there could be no clashing between interests destroyed by a common catastrophe. If it required all of block 16, and only part of the proceeds of block 14, then the contest would be between Greenebaum & Foreman and Ricker, over the surplus. In any event, Powell would be paid, and the controversy limited to the real parties to it.

It is carrying the rule of the inverse order to an inconvenient and dangerous extreme, to undertake to deal with second or third incumbrances in the way of sale on the original mortgage.

Nevertheless, this has been attempted in this decree; and in the attempt, substantial error has intervened in the order of sale—error apparent upon the record proper without reverting to the evidence to demonstrate it.

*Second.* There is error of law apparent, in that the decree does not conform to the decretal order of May 15, 1875.

The Master's report, as originally made, provided for the sale of block 14 first, and then of the two parts of block 16. Ricker excepted, and his exceptions were

sustained, and the report ordered to be reformed by prescribing the sale of the parts of block 16 first, and then block 14; and the Court directed, "the order of sale as indicated in said report," *as so reformed*, to be then followed.

Here was the Master's report *confirmed*, and a decretal order thereon, yet the decree subsequently entered imported into the record the exception of the Rogers title carved out of the first parcel to be sold, and directed that title to be sold after block 14.

I insist that the order of the Court of May 15th, 1875, was final, and could not be changed without a re-hearing. The order of May 15th could have been set aside, and thereupon the cause set down again and sent back to the Master with directions, *or* Mr. Ricker's exceptions could have been overruled upon setting aside the order, instead of sustained, but it was not competent for the Court to decree differently from its own order, upon which the parties had a right to rely as final, which, in correct practice, it was.

The hearing upon the exceptions was the *final* hearing. It was the hearing "*for directions for a final decree*," according to equity practice. There was never any other hearing, and to enter a decree different from the determination already arrived at and *entered of record*, was equivalent to the Court sitting to reverse its own decree, *ex parte* and without notice, and then entering a different judgment, leaving the other unreversed.

In *Forniquet* v. *Perkins*, 16 Howard, 82, the Court say: "The case was at final hearing on the argument upon the exceptions; and all of the previous interlocutory orders in relation to the merits were open for revision, and under the control of the Court. * * And if the Court below, upon further reflection or examination, changed its opinion after passing the order, or found that it was

in conflict with the decision of this Court, it was its duty to correct the error."

It is *interlocutory* orders that may be corrected upon *final hearing*, but a decretal order entered upon a final hearing cannot be changed without a re-hearing.

Thus in *Turner* v. *Turner*, 1 Swanston, 154, it was held that it was not competent for the Lord Chancellor to order the Master to review a report confirmed and followed by a decree of the Master of the Rolls, containing consequential directions, whilst *that decree stands.*

In *Hawkins* v. *Day*, 1 Ves., 189, "On petition that the Master should review his report, after exceptions thereto taken, argued, and the report *confirmed by judgment of the Court, Lord Chancellor* said he never knew an order to that purpose, and it would be of mischievous consequence, but errors in computation merely, might be set right at any time."

Mr. Daniels (Chancery Practice, Vol. II, 4th Ed'n, p. 1321), says: "In general, however, the Court is very cautious in admitting applications to review a Master's report after it has been confirmed, and it is only in cases of fraud, surprise, or mistake, that it will be permitted; and even then it will not be allowed unless a very strong case is made."

Citing *Turner* v. *Turner* (1819), 1 J. & W., 39.
*Drought* v. *Redford*, 1 Moll., 573.

It is held that in relation to facts the decision of the Master will not be interfered with, unless it is a very plain case of error or mistake.

*Izard* v. *Bodine*, 1 Stockt. (N. J.), 309.
*Sinnickson* v. *Bouere*, 1 Stockt. 659.
*Howard* v. *Scott*, 50 Vermont, 48.

These authorities show that the Court will rarely set aside an order of confirmation, and only then upon applica-

tion regularly made, and that the Lord Chancellor cannot proceed to decree inconsistent with the decree of the Master of the Rolls, while the latter stands.

When a Master in chancery determines the order of sale he acts *quasi* a judge of the Court.

*Snyder* v. *Stafford*, 11 Paige, 71.

The decree in question not only disregards the judicial determination of the Master in Chancery, but the Court's *own* decretal order on final hearing.

It will be perceived also that by the course pursued all parties were cut off from filing exceptions.

That part of the decree of which Ricker complains, was not presented by the Master's report, so that he or any other party could except; yet the general rule is that the Appellate Court will not consider objections unless presented by way of exceptions to the Master's report.

This is one of the results of the course pursued and aids to demonstrate the necessity of adherence to the established rule that a decretal order upon final hearing is conclusive unless set aside *upon a rehearing* regularly sought and granted.

*Third.* There is error of law apparent, in that the Court excepted the Rogers title and directed its sale *after* block 14, without any cross-bill, raising the issue of priority as between the co-defendant Ricker and Greenebaum & Foreman.

Where persons in opposite interests are co-defendants, a cross-bill must be filed to settle their rights as between themselves. It is essential to affirmative relief.

2 Danl. Ch. Pr. (4th Ed.), 1550.

*Hurd* v. *Case*, 32 Ill., 45.

*Tarleton* v. *Vietes*, 1 Gil., 470.

And in *Iglehart* v. *Crane & Wesson*, 42 Ill., p. 271, it is decided that where defendants to a foreclosure seek the application to their co-defendants of the rule of the inverse order, it is essential that a cross-bill should be filed, because they are seeking a decree *to the prejudice of their co-defendants.*

It is difficult to imagine a case which would better illustrate the reasons upon which this rule is founded, than that at bar.

So far as the complainant in the original bill, Powell, was concerned, the property was all subject to his mortgage, and it was only as between the subsequent purchasers that the question of the application of the rule became important.

Even if it was not necessarily essential in this case that cross-bills should be filed to determine as between different *parcels*, which should be sold first, or if it could be held that the parties had in any way waived that necessity, yet this is not true as to Greenebaum & Foreman, for they only claimed under a second encumbrance, and in effect, if entitled at all, were only so entitled by way of subrogation, or by claim to the surplus.

An issue with them involved not only the balancing of equities, but the ascertainment of what was actually due them upon their claim.

The decree as entered definitely determines that their equities are superior to those of Ricker, although the pleadings presented no such contention, and the subject is not considered in the Master's report at all.

III.

*There being error of law apparent, the Court should have entered a decree upon the bill of review, revising and modifying the original decree.*

The bill of review may be treated as having been filed as of right, and the judgment of the Court dismissing the petition, as if it were entered upon demurrer to the bill of review.

The only answer to the allegation of error apparent, is a denial of its existence. If there is such error, then the decree may be reversed without any further hearing.

2 Danl. Ch. Pr. (4th ed.) p. 1,583.

*Cooke* v. *Barnfield*, 3 Swanston, 607.

IV.

*There being error of law apparent, the bill of review was presented in apt time.*

A bill of review, or one in that nature, upon newly discovered evidence, can manifestly be filed within a reasonable time *after the discovery is made;* but when the bill may be filed as matter of right for error of law apparent, the general rule is that it must be filed within the period prescribed for taking an appeal, to-wit: two years from the entry of the decree. This is not because the statute operates as a limitation, but because the courts, acting upon the principle that laches and neglect ought to be discountenanced, adopt the statutory limit, by analogy.

Story's Eq. Pl. § 410.

*Thomas* v. *Harvie's Heirs*, 10 Wheaton, 146.

But where the reason fails, the rule does. *Cessante ratione, cessat ipsa lex.*

If the delay is *sufficiently accounted for*, a bill of review will be sustained for error of law after the lapse of time which would bar a writ of error.

*Buckner* v. *Forker*, 7 Dana, 51.

This must manifestly be so, as the limitation is applied only by analogy, and for the discouragement of state claims, as is stated in *Thomas* v. *Harvie's Heirs*, *supra*. There being no *laches* or adequate excuse shown for delay, the limitation should not be applied. The case at bar is peculiar. The decree is for foreclosure, and the controversy before the Court is between co-defendants. The order of sale was determined by the Master in the first instance, and then by the Court on hearing of exceptions filed by the present appellant, who alone of the defendants concerned, showed *diligence* in that respect.

The decree was drafted in accordance with the decretal order of May 15th, and submitted to Mr. Ricker's counsel, and ageed upon. It was subsequently, by some untoward accident, changed without notice. Another defendant then appealed and obtained a supersedeas in August, 1875. This transferred the cause to the Supreme Court. The printed record was not sent to counsel until December, 1877, or January, 1878, and then, for the first time, the change was discovered.

It may be said that Ricker or his counsel ought to have known the contents of the decree, and are to be held to have had such knowledge, because Ricker is a party to it.

But in the first place, when the question is one of diligence merely, it would be unjust and inequitable to apply the doctrine of constructive notice to bar relief on the ground of *laches*, which can only exist where a party

has *knowingly* slept upon his rights,or where he is estopped in favor of another whose rights have accrued in reliance upon his inactivity.

The appeal suspended the sale, and the parties stand now exactly where they did then.

And in the second place, the appellant was not bound to know that the Court would disregard its own decretal order. On the contrary, the appellant had a right to rely upon the rule of law, that the Court could not change its previous decree without a regular re-hearing upon notice.

It may further be suggested that the bar should be applied, because an end to litigation is deemed for the public interest. But public justice demands that the rights of individual suitors be protected and correct conclusions reached, and where manifest error has intervened, it ought to be corrected in his favor who has done nothing to forfeit his claim to relief.

The discovery of the change was made in December, 1877, or January, 1878, and the application to file the bill of review was made March 3d, 1879, then suspended by the recall of the cause, and renewed May 21st. This was within two years of the discovery. The cause was pending in the Supreme Court until about December, 1878, and the mandate filed early in February, 1879.

It was entirely reasonable for Mr. Ricker to await the decision upon this appeal before filing his Bill of Review, irrespective of the question as to whether he could have filed it while the record was withdrawn to this Court.

Indeed, an error fatal to the decree, as it stood, existed, and the decree was reversed in part to allow the right of redemption. The decree had to be amended and until then it was reasonable for Mr. Ricker to delay his proceedings.

Fourteen months was not unreasonable in itself, and certainly not in view of the fact that the parties' rights not only remained unchanged, but it was known that they *must* remain unchanged, as the decree was sus pended by the appeal.

## V.

*There is error by reason of accident or surprise.*

The facts in relation to the decree are fully set forth in the affidavit of Mr. Smith, which is exceedingly minute and explicit, and demonstrates that the draft was changed before record, and without notice. It is not material to inquire how this happened. It is enough that through some inadvertence, *not on the part of Mr. Ricker or his counsel*, it did happen. The consequences are precisely the same as if an intentional fraud, a fraud in fact, had been committed, and the right to relief is the same.

In *Stevens* v. *Guppy*, 1 Turner and Russell, p. 178, held, that where the enrolment of a decree is gained by surprise, the Court will vacate it. Lord Chancellor Eldon says: "I have no difficulty in saying that it is a surprise, *if the party enrolling the decree* has said that which might lead the other party to believe that the decree would not be enrolled."

The motion was made for the purpose of letting in the plaintiff to appeal from the decree, which was *pronounced upon the merits*, and *Mr. Romilly* argued, that even if a case of surprise was made out, the Court would not vacate the enrolment when the decree was made upon the merits, but nevertheless "the order was made for vacating the enrolment."

It may be contended that this rule applies only when

there is something approaching deception or *mala fides;* but this can not be universally so, or at least, there can be no obligation to show *intentional deception.* In the case at bar the decree was drawn as prescribed by the decretal order. It was submitted to Mr. Ricker's solicitor and agreed to. Afterwards it was changed, and *without notice,* when it should have been shown again in its altered condition to Mr. Ricker's solicitor. This was not done,and the omission to do it, however accidental, operated as a fraud in law. Clearly, there is no necessity in such a case of attributing base motives and intentional deceit.

## VI.

*There is error on the ground of newly discovered evidence.*

Leave to file a bill of review grounded on the discovery of new matter, will be granted when the petition and affidavits show:

1. That the new mattter is relevant and material, and may *probably* produce a different determination.

2. That it has first come to the knowledge of the party after the time when it could have been used, and that there was no laches in respect to the discovery.

Story's Eq. Pl. §§ 412, 413, 414.

1. *The new matter is material and relevant, and would not only probably, but certainly, change the decree.*

This evidence has already been referred to, and may properly be here re-stated.

The affidavits establish:

*First,*—That Greenebaum & Foreman obtained the Kinney note in October, 1873, more than six months after the record of the deed to Ricker (April 5, 1873), for

an overdue check of $7,500, and $2,000 in cash, of Samuel J. Walker, at which time Walker *owned the interest and estate* created by the Rogers trust deed, ordered by the decree to be sold *after* Ricker's block—block 14.

This proves as *matter of fact*, what I have contended appears upon the face of the deed as matter of presumption. If the record of the Rogers trust deed of October 30, 1873, creates the *presumption* that *then* was the time Greenebaum & Foreman acquired, or can claim to have acquired, the Rogers interest, then the newly discovered evidence on this branch of the case is immaterial, and there is error of law apparent on this ground. If that presumption does not arise, then the proof of the fact is material and decisive, and is not cumulative.

The rule of the inverse order is based upon selling *first* what the original mortgagor owned, and Samuel J. Walker occupied the position of the original mortgagor. Hence, as when Ricker recorded *his* title to block 14, Walker still owned this estate, title and interest in block 16; this estate, title, and interest, should be sold before Ricker's block, and the decree should have so ordered. Full discussion of this point has already been had.

*Second*,—That Walker was *insolvent* at the time Greenebaum & Foreman took the Kinney note of him, to *their knowledge*, and unable to respond upon his warranty.

Hence, Ricker was entitled to pay the Powell mortgage, and demand an assignment of the Kinney note upon the principle of subrogation, and Greenebaum & Foreman took subject to that right.

"Where a mortgagor of two parcels, to secure one debt, sold one to A B, taking back a mortgage to secure the purchase money, and then sold the other parcel to C D, and *became insolvent*, and C D had to pay the entire debt, it was held that he thereby became entitled to have

the mortgage given by A. B. to his grantor, assigned to him, and by means thereof, to compel A B to contribute towards the redemption of the original mortgage."

*Allen* v. *Clark*, 17 Pick., 47.

*Third*,—That Kinney, before he took conveyance of block 16, in November, 1872, knew that Messrs. Coolbaugh & Powers held title to said block by deed of July 1, 1872, not then recorded, and took his conveyance from Walker upon the agreement of the latter to procure Coolbaugh & Powers' deed, and that Greenebaum & Foreman had notice of this fact.

Hence the title derived by Kinney in November, 1872, from Walker, was subject to the title in Coolbaugh & Powers, who conveyed back to Walker in the spring of 1874, while Ricker got his title to block 14 from Walker, who obtained the deed of that block from Coolbaugh & Powers in the spring of 1873.

Whether Greenebaum & Foreman had actual knowledge is immaterial, although Mr. Walker testifies they had, because the deed to Coolbaugh & Powers was recorded Dec. 7, 1872, and the notice from the record coupled with Kinney's actual knowledge, charge Greenebaum and Foreman with notice.

1 Jones on Mortgages, § 574, and cases.

*Fourth*: That Kinney gave his note originally to be applied in extinguishment of the Powell mortgage by agreement with Walker, of which agreement Greenebaum & Foreman had knowledge.

This was equivalent to an agreement on Kinney's part to pay the Powell mortgage to the extent of the note, which was purposely fixed at the then principal sum due on that mortgage, to wit: $12,000. Of course, if Greenebaum & Foreman took without notice, there is nothing

in this, but if they knew of the arrangement, they are bound by it so far as to preclude selling any *other* part of the property prior to this. In other words, this disposes of the inverse order as to this block. These facts are all positively averred in the affidavits.

2. The newly discovered evidence came to the appellant's knowledge long after it could have been used, and he was guilty of no laches in making the discovery.

The evidence was discovered in 1879, and a few weeks prior to the application for relief. Of course, this was long after the evidence could have been used, and the application was made with all reasonable promptness after the decree was re-entered.

But it may be argued that Mr. Ricker did not use due diligence—that is, that he might have made the discovery before, and is guilty of *laches* because he did not.

There are several satisfactory answers to this position:

*First:* Greenebaum & Foreman can not be heard to make the objection.

In their answer and in the testimony given by one of them, *the time when* and the circumstances under which they obtained the Kinney note and Rogers trust deed, are sedulously concealed.

In *Sheffield Canal Co.* v. *Sheffield Railway Co.*, 1 Phillips, 484, a bill for specific performance was dismissed, and the Court *allowed a bill of review* on an affidavit of the discovery that the agreement had been recognized by a resolution of the company, although the Court was of the opinion that the plaintiffs might *with due diligence*, have made the discovery soon enough to have availed themselves of it in the original suit, *on the ground* that if the defendant company had entered the resolution on their books, as required by their charter, the consequence of any want of care on plaintiffs' part would have been obviated.

It was incumbent on Greenebaum and Foreman to file a cross-bill in the assertion of their claim. This they did not do. Nor did their answer come within the rule, in relation to what an answer must contain where a party claims superior equities on the ground of a *bona fide* purchase.

This was settled by this Court in *Boone* v. *Chilles*, 10 Peter's R., 211, where it is said: "In setting it up by plea or answer it must state the deed of purchase, the date, contents and parties briefly; that the vendor was seized in fee and in possession; the consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to and down to the time of paying the money and delivery of the deed," &c., &c.

See, also, *Brown* v. *Welch*, 18 Ill. 346.

Greenebaum and Foreman's answer *on its face* shows that the Kinney note was given for purchase money; does *not* state when they got it of Walker, but simply says, "that said note so secured by said trust deed, is now owned and held by these defendants for a valuable consideration."

As against Ricker, there is absolutely no pleading, making an issue as to the equities between Greenebaum & Foreman and himself, and there is nothing calling on him to use diligence in reference to the acquisition of their claim by Greenebaum & Foreman. Had they have done what it was their duty to do, if they had equities which they claimed were superior to Ricker, the consequences of any want of care on his part would have been obviated.

*Second*,—*The burden of proof* was upon Greenebaum & Foreman, to show that the note and trust deed had been parted with by S. J. Walker *prior* to April 5th, 1873, the

date of the record of the deed to Ricker, and not on Ricker to show that Walker held them afterwards.

The Rogers trust deed was recorded October 23, 1873. This alone demonstrates error of law apparent, and is conclusive on Greenebaum & Foreman as the record stands, but if this were not so, to the extent of an estoppel, nevertheless, the utmost they could claim would be the right to show that they obtained the security between December 5th, 1872, when the deed to Kinney was recorded, and April 5th, 1873, when that to Ricker was.

This they did not and could not do, because it was not the fact.

It follows that they cannot object that Ricker was negligent in not discovering what they knew all the time was fatal to their claim, when the law imposed it upon them to adduce proof to the contrary, if such existed.

*Third*,—But Mr. Ricker was not negligent.

He had no means of knowledge—nothing to put him upon inquiry—nothing to rouse suspicion *except* the fact that the trust deed was not recorded until Oct. 23d, 1873, and if that created no presumption, it could excite no suspicion. It was not until after the notice in January, 1879, that Powell would apply for the mandate to issue at once; that then Walker made known what up to that time he had carefully avoided disclosing.

Either the record of the trust deed in October, 1873, was *conclusive* against Greenebaum & Foreman, or it created a *presumption* against them, which it was for them to rebut. In either event there was nothing for Mr. Ricker to do until they had done or attempted to do something. If the date of the record had *no* significance, then there was nothing to put Mr. Ricker upon inquiry, and involve him in the guilt of laches if he did not make

it. If the date of record *did* possess significance, that significance was that it raised a *presumption*, and if this be so, then it was for Greenebaum and Foreman to rebut that presumption.

The Court will remember that there was *no issue whatever* in this case, as to the claim of Greenebaum & Foreman. Not upon cross-bill, for none was filed, nor upon answer, if there could be an issue on that pleading, which is denied, for the answer of Greenebaum & Foreman even did not claim that the Rogers estate and interest should be sold after block 14, but only that property conveyed subsequently to the deed to Kinney should be sold *before* block 16. (See answer, Rec. p. 24.)

The controversy before the Master appears to have been, so far as these blocks were concerned, which block should be sold first, and not at all as to the Rogers estate, title and interest. The Master's original and amended reports relate to this, and it is only when the decree is recorded that this estate, title and interest under the Rogers trust deed is carved out, and assigned a place in the order of sale.

With the Master's report as originally made, Ricker was dissatisfied, because it put block 14 to be sold before block 16. He excepted and succeeded, and the decretal order of May 15th, directing block 16 to be sold before 14, was entirely satisfactory to him. Why should he seek to make that better which was already well enough? And how can he be accused of *laches* for not seeking and discovering evidence (if he could), the necessity for which was not rendered apparent by any proceeding in the case?

It is true, S. J. Walker was called as a witness, but this was done on behalf of the defendants, represented by Greenebaum & Foreman's solicitor; and the solicitors of Mr. Ricker were not present at that examination, (see

printed record, p. 44), and probably had no notice of it. Nor was it essential they should, as Walker was not called in relation to the Rogers trust deed. And this is also true of Mr. Greenebaum himself. (See printed record, p. 52).

There is nowhere to be found in this record any ground upon which it could fairly be contended that Mr. Ricker's diligence was required to be exerted in reference to the Rogers trust deed.

*The determination of the Court below is reviewable.*

If the bill of review had been predicated upon newly discovered evidence *only*, appellant would have been required to apply for leave to file it, and whether permission should be granted or refused, rested in the sound discretion of the Court. In Illinois the rule is settled that "*in chancery*, all matters, whether of discretion or positive law, are subject to review in a superior court."

*Moore* v. *Bracken*, 27 Ill. 26.

Were the rule otherwise, still the action of the Court in refusing leave would be reviewable, because it is the final disposition of *a new suit.*

In the instances of motion for continuance, to set aside default, to change venue, for new trial or rehearing, the denial of such motions may involve discretion *purely*, and unless the discretion were abused, the action of the Court would not be inquired into.—(In case of *abuse of discretion*, the decisions in all the states are believed to concur, that the action of the lower Courts will be reviewed.)

But in reference to final action in disposition of a new suit, the rule is otherwise. The refusal of leave to commence a suit, determines the right of the party in precisely the same way that it would if the bill was dismissed on final hearing.

Hence, although the law in such a case confers a discretion upon the Court, it is one that can be reviewed in an Appellate Court.

*Fuller* v. *Claflin*, 93 U. S. (3 Otto) 14 illustrates the distinction. The Court below had directed an answer to be made more specific, and a further answer was filed but stricken out and judgment entered. On error to this Court, the Court says: "It is objected preliminarily, that the order directing the answer to be made more specific is one depending upon the discretion of the Court, and that it is not appealable. It is said that the refusal of the Court to grant further time to perfect the answer, is also a discretionary order, and not appealable. This may be true.

"There is undoubtedly a large class of cases involving the *procedure merely* in a cause, in which the Court acts as in its discretion, it thinks best, and where no appeal can be taken from its decision. It is quite likely that an order to make the answer more specific falls within this category. So it may well be conceded that the refusal to give further time until the next morning, to comply with the direction, comes within the same rule * * The rule we are speaking of has sometimes been held to apply to an order *refusing* to strike out an answer. But it does not apply to an order which *strikes out* an answer. *That is not a mere procedure in the cause. It is the ending of the cause*, leaving the action undefended, and with a right to immediate judgment."

And the Court examines whether the amended answer complied with the requisition of the Circuit Court, holds that it did and decides the striking out to have been erroneous, and reverses the judgment.

For the same reason, if the lower Court in the exercise of, not an arbitrary or mere, but a *legal* discretion, refuses

leave to file a bill of review, that refusal being an ending of the cause, a final judgment arrived at in the outset, such judgment must necessarily be subject to revision. "It is everywhere admitted," says Mr. Justice CLIFFORD, *Ins. Co.* v. *Piaggio*, 16 Wallace, 386, "that a writ of error will lie when a party is aggrieved by an error in the foundation, proceedings, judgment or execution of a suit in a Court of record."

What is meant by the rule that leave to file bills of review on newly discovered evidence is within the discretion of the Court, is only that leave is not granted *as a matter of course*, but not that leave may be arbitrarily refused.

Thus, under the statute of Anne, and in Illinois, the granting of leave to file an information in the nature of a *quo warranto* is within the sound discretion of the Court, but the refusal to permit this to be done has been repeatedly held reviewable in the Supreme Court, because it is not matter of pure discretion, but of sound discretion according to law, and the refusal is a final ending of the cause. Nor is this at all upon the ground of an abuse of discretion, but of its erroneous exercise.

*People, &c.* v. *Waite*, 70 Ill. 25.

*People, &c.* v. *Callaghan*, 83 Ill. 128.

And see *Terry* v. *Bank*, 92 U. S. (2 Otto) 454.

See also, directly in point: Ettridge vs Hill & Porter (Ala) 47
State vs Burnett 2 Ala 140

## VII.

*The rule as to execution of decree, has no application.*

Ordinarily the rule is that the original decree should be performed before bill of review brought, but this varies with the circumstances.

2 *Danl's Ch. Pr.* (*4th. Ed.*) *p.* 1582 *and notes.*

2 Barb. Ch. Pr. (2nd Ed.) p. 425.

2 Barb. Ch. Pr. (old Ed.) p. 96.

*Story's Eq. Pleading*, § 406 *and note.*
*Griggs* v. *Gear*, 3 Gil. 2.

In the case at bar the defendant Ricker was not called upon to perform anything. The decree affected him only in the order of sale.

Under the circumstances, the filing of the bill of review might, perhaps, affect Powell, by the difference between ten per cent., the rate of interest on the mortgage, and six per cent., the rate on the decree, assuming that all of the original decree were retained, except so much as relates to the order of sale, which is the part attacked by the bill of review.

But the amount is inappreciably small. The principal sum due on the Powell mortgage is $12,000 and interest. The amount of the decree was between $14,000 and $15,000. Interest at six per cent. on the decree gives compound interest to an extent bringing the interest on the principal to about eight per cent.

Again, if Ricker prevails upon his bill, there is nothing to prevent the Court from re-opening the present decree and causing the interest to be calculated at the rate named in the mortgage. Powell's security is worth over $200,000, as the petition shows, and is really greatly in excess of that.

Upon the granting of this appeal, an order staying the execution of the decree until this cause could be heard, upon Ricker giving bond in the sum of $5,000 which he did, was entered in the cause of *Powell* v. *Walker, and others.*

It is really a question of the conditions on which the sale should be stayed, if the bill of review be permitted to be filed, or it be held that Ricker had the right to file it without permission.

The sale might be allowed to proceed as to the 201 feet, and as to the 100 feet of block 16, as now provided by the decree, and the Master be restrained from proceeding further at present, upon Ricker giving bond, conditioned if he were decided against, to pay the balance on the Powell mortgage, after deducting the amounts received from the sale of the two parcels above specified.

As the decree now is, Mr. Ricker's rights are fixed, and any condition that permits him to attack the decree, is preferable to allowing the sale to proceed under it as it now stands.

But if there be error of law apparent, the original decree must certainly be reversed, and in that event, it would hardly seem that any further condition would be required.

## VIII.

*An appeal lies from the judgment of the Circuit Court dismissing appellant's petition for leave, with costs.*

1. This is in every respect a regular judgment upon the petition, and it is difficult to understand why an appeal would not lie therefrom.

2. An appeal from a mere order refusing leave must lie, if the petitioner had an absolute right to file the bill, because the order depriving him of the right is *final*, and does not involve the exercise of discretion. And appellant had this absolute right to file the bill of review *for error of law apparent*, or on that ground *and* the others assigned, as we have seen under the first point.

The fact that he applied for leave when he need not have done so, can make no difference in this regard, or justify the Court in denying what appellant was entitled to without asking.

The order refusing leave is equivalent to an order sustaining a motion to strike the bill out or to dismiss the suit, or sustaining a demurrer to the bill, and from *such* an order there is no doubt an appeal lies.

This, because the filing was matter of right, the order refusing leave was final, and the Court had *no* discretion in the premises.

3. But if leave had to be applied for, which is true of a bill of review, grounded *only* on newly discovered evidence, and the Circuit Court could exercise discretion, still the order denying leave could be appealed from.

This, because it is *final* action in disposition of a new suit.

The right of the party is determined in precisely the same way as if the bill had been dismissed on final hearing.

This has already been argued under the sixth point.

*Fuller* v. *Claflin*, 93 U. S. (3 Otto), 14.
*Terry* v. *Bank*, 92 U. S. (2 Otto), 454.
*People, etc.*, v. *Callaghan*, 83 Ill., 128.
*Moore* v. *Bracken*, 27 Ill., 23.

Respectfully Submitted,

MELVILLE W. FULLER,
*Of Counsel for Appellant.*

IN THE

# SUPREME COURT OF UNITED STATES,

October Term, A. D. 1879.

SHERMAN A. RICKER,
*Appellant,*
*v.*
NATHAN POWELL, ELIAS GREENEBAUM, AND GERHARD FOREMAN,
*Appellees.*

Appeal from Circuit Court of the Northern District of Illinois.

## REPLY FOR APPELLANT.

W. C. GOUDY,
*For Appellant.*

CHICAGO:
Beach, Barnard & Co., Legal Printers, 104 Randolph Street.
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Appeal from Circuit Court of the Northern District of Illinois.

## REPLY FOR APPELLANT.

The appellee, Nathan Powell, filed his bill to foreclose a mortgage to secure a note given for the purchase money, on a tract of land, by Henry H. Walker and Samuel J. Walker. The appellant, Sherman A. Ricker, and others, were made defendants, with the averment that they had or claimed some interest in the premises, as subsequent purchasers, incumbrancers or otherwise, but subject to the mortgage. Proceedings were had resulting in a decree June 5, 1875, for sale unless the said Henry H. Walker, or some of the other defendants pay or cause to be paid to the complainant, within one hundred days from the entry

of the decree, the said sum so found to be due ($14,853.33), with interest, etc. (Record, p. 59.)

The decree found that the mortgaged premises had been subdivided since the date of the mortgage, and that the property covered by it, was known as blocks 13, 14, 15, 16, 17 and 18, of Packer's Subdivision, &c., and that conveyances of different blocks and parts of blocks had been made, and ordered that the premises be sold in the inverse order of alienation:

1st. The N. 201 feet of B. 16, excepting and reserving the estate and interest of John G. Rogers, and Greenebaum and Foreman, by virtue of a deed of trust by Kinney to Rogers, dated Nov. 25, 1872, and recorded Oct. 23, 1873.

2d. The S. 100 feet of B. 16.

3d. B. 14.

4th. The said estate of Rogers, Greenebaum and Foreman.

5th. B. 13 and 18.

6th. B. 15.

7th. B. 17.

The several sales of parcels of the mortgaged premises appear as a part of the record.

From the decree Orvis, one of the defendants, appealed, and for this reason its execution was stayed from August 16, 1875, until in May, 1879.

On the appeal of Orvis the cause was twice argued before this court and affirmed.

*Orvis* v. *Powell*, 98 U. S., 60.

The second opinion is not printed in the reports, and I, therefore, attach it to this argument.

The mandate was filed May 15, and, on the 21st,

Ricker, one of the defendants, filed a petition for leave to file a bill of review, upon the grounds of error of law apparent on the face of the record, accident and surprise, and newly discovered evidence.

The petition was supported by affidavits as to accident and surprise, and newly discovered evidence.

The Circuit Court refused to allow the bill to be filed, and dismissed the petition, with judgment for costs against Ricker. Appeal was taken from this decree and judgment.

The appellant complains of this action of the Circuit Court, and insists that the petition should have been granted, and the decree revised and modified.

Mr. Fuller has presented the points and authorities to sustain the errors assigned, and I do not intend to repeat them, but will content myself by replying to the propositions of counsel for the appellees.

## I.

### THERE IS ERROR OF LAW APPARENT.

It is admitted that the evidence cannot be examined to find error of law apparent, but the court will confine itself to the pleadings, proceedings, orders, Master's report and decree, according to the rule announced in *Putnam* v. *Day*, 22 Wal., 60.

Following this rule it appears from the bill, answers, orders, Master's report and decrees, that errors were committed.

FIRST. *In ordering block 14, the property of Ricker, sold before the estate of Rogers, Greenebaum and Foreman, in the North 201 feet of block 16.*

When, how, and from whom did Greenebaum and Foreman acquire an estate?

Their own answer shows that the only estate held by them, or by Rogers, consisted of a promissory note executed by John D. Kinney to Samuel J. Walker for a part of the purchase money, secured by a deed of trust, or mortgage, by Kinney to Rogers, which was not recorded until October 23, 1873. It further appears from their answer, that Samuel J. Walker became the sole owner of all the mortgaged property, subject to the Powell mortgage, which he assumed to pay, and thereby became the mortgagor, and that since the deed by Walker to Kinney was made and recorded, Dec. 2, 1872, that block 14 was conveyed, but there is no claim that the Rogers trust deed was executed or recorded before block 14 was deeded, and there is no averment that Walker transferred the note before he conveyed block 14. The pleaders are careful to avoid such a false statement, and merely say that the note was owned and held by Greenebaum and Foreman, when the answer was filed. It further appears from the pleadings of Ricker that he purchased block 14 of Samuel J. Walker, in February, 1873, and received a warranty deed, which was recorded April 5, 1873.

It appears from the Master's report that there was an abstract of title, (p. 40), and that it was made a part of his report, (p. 61). This abstract is set out in the record, p. 64, and from it we can ascertain the dates of the execution and record of each conveyance. So far as they relate to blocks 14 and 16, which is all that is material for the present enquiry, they are as follows:

*Block* 14. Warranty deed of Samuel J. Walker to Sherman A. Ricker, Feb. 25, 1873, recorded April 5, 1873.

*Block* 16. Warranty deed of Samuel J. Walker to John D. Kinney, Nov. 25, 1872, recorded Dec. 2, 1872.

Trust deed of John D. Kinney to John G. Rogers, dated Nov. 25, 1872, recorded Oct. 23, 1873.

Release of John G. Rogers to John D. Kinney, of South 100 feet, April 8, 1874, recorded April 16, 1874.

Deed of John D. Kinney to Henry H. Walker, March 6, 1874, recorded March 16, 1874.

It appears from the decree that the estate of Rogers, Greenebaum and Foreman was derived from a trust deed, dated Nov. 25, 1872, and recorded Oct. 23, 1873.

Now these facts show that Samuel J. Walker conveyed to both Ricker and Rogers, that Ricker was a purchaser of the fee, and received and recorded his deed without any notice of the unrecorded deed to Rogers, that at the time Ricker completed his purchase, the estate, vested nominally in Rogers by the unrecorded deed, was for the use of Samuel J. Walker, that Greenebaum and Foreman obtained their interest and estate from Samuel J. Walker, after Ricker had secured his title, and the deed of trust was then recorded Oct. 23, 1873.

Ricker was prior in point of time to Greenebaum and Foreman by six months, and so according to the rule of inverse alienation, the estate of the latter and Rogers who held for them should be sold before that of Ricker.

Counsel for appellee make a further answer to appellants' proposition by saying that Greenebaum and Foreman took a negotiable note, and are entitled to the presumptions and rules applicable to that kind of paper.

I reply first, that there is no presumption of law that a promissory note was assigned by the payee at its date, although there is a presumption that it was assigned before maturity.

I reply, second, there is no effort by appellant to deprive them of the promissory note. They claim an estate in the land, and have an order that such estate shall not be sold

until after block 14. Such estate was not complete under the laws of Illinois until the deed was recorded. While Ricker was not a subsequent purchaser of the same property conveyed by the unrecorded deed to Rogers, yet the rule adopted by courts of equity of sale of mortgaged premises in the inverse order of alienation, will adopt the recording laws, because it would be unjust and inequitable to charge in equity a purchaser with a liability and lien of which he had no notice by reason of the fault of the person who had neglected to record his deed. As between them the failure to file the deed for record loses the position which he might have occupied. As between two parties, even if equally meritorious, where a burden must be thrown upon one of them, it must fall on the one who, by his own act, has misled the other.

By the law of Illinois, the assignee of negotiable paper acquires no superior right to the payee from whom he received, so far as mortgage security is concerned. Greenebaum and Foreman took just the position of Samuel J. Walker in the mortgage. If this is so, then as Walker could not demand a sale of the Ricker block before his estate in the Rogers deed of trust, so Greenebaum and Foreman could not.

The Supreme Court of Illinois has decided that the assignee of commercial paper before maturity who seeks to foreclose a mortgage securing the note, cannot prevent any defense which could be made against the payee.

*C. & S. R. R. Co.* v. *Loewenthal*, opinion filed Sept 25, 1879, 12 Chi. Legal News, p. 19, Oct. 4, 1879.

*Colehour* v. *Savings Bk.*, opinion filed Feb. 22, 1879, Ill., Syn. Rep. 177.

*Olds* v. *Cummings*, 31 Ill., 188.

But counsel for appellees further answer that they hold,

under Kinney, and that he was indisputably a prior purchaser to Ricker.

I reply, that whatever position Kinney had originally, it was made inferior to that of Ricker, when Kinney reconveyed the premises to Walker, the mortgagor, on the 11th of April, 1874.

This court so decided in *Orvis* v. *Powell*, in the second opinion, where it said that the property coming to the hands of Henry H. Walker, the priority of the original mortgage became re-attached to it.

Therefore, Greenebaum and Foreman can gain nothing by claiming under Kinney. They must stand in the place given them by the trust deed to Rogers.

I reply further, that it has never been held that a mortgagee was an alienee, within the rule of the inverse order of alienation. This decree speaks of an "estate, right, "title, interest, claim, property, and demand of the said "John G. Rogers, and of the said Elias Greenebaum and "Gerhard Foreman," it seeming to be doubtful what the thing was to be called. Rogers was not a purchaser. Greenebaum and Foreman were holders of a note, secured by the deed to Rogers. The whole transaction was a mortgage. The man who executes a mortgage, has pledged the property as security, not alienated it. The mortgagee has a security for the money, but does not own the land; he does not stand on an equal ground with a *bona fide* purchaser.

Suppose a mortgage is made to secure one hundred notes, or bonds, and these pass to as many different persons, and parcels of the mortgaged property have been conveyed at different times, so that each bondholder, as mortgagee, has a position in equity different from the others; certainly a court of equity will not apply the rule of inverse order of alienation. If not in such a case, it ought not to be done in any case of a mortgage.

The counsel for Powell contends this is the rule (Isham's argument, 10, 11), and attempts to avoid the effect, by claiming that Greenebaum and Foreman stand in the shoes of Kinney. I agree with him, but as Kinney has lost the right to claim priority to Ricker, that shows error in the decree rendered in this case, when it treats the *unnameable* interest of Greenebaum and Foreman as an estate to be protected.

SECOND. *There is error of law apparent, because the decree of June 5, 1875, ordering a sale, does not conform to the Master's report, or the decree of May 15, 1875, sustaining exceptions to the report.*

Counsel for appellee make no answer to this point. The facts are undisputed.

The Master found that block 14 should be sold first, and did not recognize the interest of Rogers, Greenebaum and Foreman as entitled to a place in fixing the order of sale.

Exceptions were filed by Ricker alone, in which he claimed that block 16, and the North 201 feet of block 16, and the South 100 feet of block 16, should be sold before block 14. (Record, p. 54.)

The court heard these exceptions, and entered a decree, by which the exceptions were sustained, so far as they relate to block 14, and it is ordered that the report be reformed, by providing that block 16 shall first be sold in the way mentioned in the report, and after that block 14, and that then the order of sale as indicated in the report be followed.

No further exceptions were heard, no other changes were made, or ordered to be made in the Master's report.

The Master, in fixing the order of sale, acted judicially, and as a judge. He was the court.

*Snyder* v. *Stafford*, 11 Paige, 71.

His decision stands, unless exceptions be taken and sustained by the circuit judge.

The hearing of exceptions is a *final* hearing, and the order or decree thereon is a *final* decree, which must be followed until it is set aside on petition; and it will not be changed, except in cases of fraud, accident, or mistake. The decree, after the Master's report is confirmed, *must* follow that report. These principles are settled by authority.

2 Dan. Ch. Pr., 4th Ed., 1321.
*Forniquet* v. *Perkins*, 16 How., 82.
*Turner* v. *Turner*, 1 Swanston, 154.
*Hawkins* v. *Day*, 1 Ves., 189.

But disregarding these rules, the court on the 5th day of June, 1875, entered a decree of sale, fixing an order different from the Master's decision and report, and different from the decree of the court on the final hearing of the exceptions. In this departure, we find for the first time this anonymous estate of Rogers, Greenebaum and Foreman, which is carved out of the fee to the North 201 feet of block 16, and this is ordered sold after block 14.

The only regular way in which this question could have been raised, was by exceptions filed to the Master's report by Greenebaum and Foreman. But they resorted to an irregular way, and one open to grave suspicion, which has produced the error and grievance of which Ricker complains.

The appellant had his hearing on the question of order of sale, and Greenebaum and Foreman had their hearing on the same question, at the same time. A final decree was entered satisfactory to Ricker. Later a provision contrary to the confirmed report and final order was made in the decree of sale. This much appears of record, and it conclusively establishes error apparent on the face of the record.

While not pertinent to the strict discussion of the point now under consideration, it seems not to be improper to refer to the facts disclosed by the affidavits, to the effect that a decree for sale was submitted to the solicitor for Ricker, which agreed with the former order, and that the deviation from that form was not discovered for nearly three years after. So that in fact, Ricker had no opportunity to be heard as to this queer estate of Greenebaum and Foreman.

On this point I call attention to Mr. Fuller's argument, (26–29.)

THIRD. *There was error of law apparent, because the court directed a sale of blocks and parcels in the inverse order of alienation, when there was no prayer therefor by the original bill, and no cross-bill for the application of the rule between the defendants.*

The counsel for Powell takes the same ground on this point that counsel for Ricker do, while the counsel for Greenebaum and Foreman merely refers to it.

The original bill prays for a decree of foreclosure on the whole of the mortgaged property, and the answer of Ricker asks that any of the land still owned by Walker may be subjected to sale, and if he owns none, then the entire property be made to respond. The answer of Greenebaum and Foreman asks that blocks 14 and 18 be sold prior to block 16, but does not ask that the mortgaged interest in 16 be reserved.

There was no cross-bill by any defendant asking affirmative relief by the application of the rule of inverse order of alienation.

*I wish distinctly to impress upon the court that there was no issue, either in the pleadings or by the evidence, in reference to the anonymous estate of Rogers, Greenebaum and Foreman, no report made thereon by the master, no hearing*

*before the court upon it, and that it makes its appearance first in the decree as entered, which was not the decree ordered on final hearing, so that Ricker has never had an opportunity to produce evidence or present argument on the question.*

Greenebaum and Foreman were required by law, to file a cross-bill invoking the application of the rule of inverse order of alienation.

*Iglehart* v. *Crane*, 42 Ills., 271.
*Hurd* v. *Case*, 32 Ills., 45.
*Tarleton* v. *Vietes*, 1 Gilm., 470.
2 Dan. Ch. Pr., 4 Ed., 1,550.

Upon another ground they were required to file a cross-bill. They held two notes secured on different parts of block 16, one as collateral security to the other as shown by their answer, and it appears from the evidence, that there was a question as to the amount due to them. The equity of redemption in the premises, which had passed from Kinney to Walker, was subject to sale before Ricker's block. A cross-bill, therefore, was necessary to fix the amount due, the value of the premises, and the protection equity would give. It did not follow that the land covered by the Rogers trust deed should be postponed in the order of sale, merely because a sum of money was an incumbrance upon it. The decree gave them affirmative relief, and to the utmost extent that could be obtained in any circumstances against their co-defendant Ricker, without any bill or issue on which to justify the introduction of evidence.

This is clearly an error apparent on the record; one which is admitted by counsel for Powell, and not denied by counsel for Greenebaum and Foreman.

It is probable that counsel see no way to prevent a reversal of the judgment below because of error apparent, and therefore resort to the lapse of time as a bar. Many

lawyers seem to hold a limitation in as high esteem as old Weller did an alibi.

## II.

THE APPLICATION FOR LEAVE TO FILE A BILL OF REVIEW FOR ERROR APPARENT WAS MADE IN APT TIME.

It is admitted that this court has said, that the proper time for filing a bill of review for error apparent, is within the time allowed for an appeal.

*Thomas* v. *Harvie's heirs*, 10 Wheat., 146.

But there is no statute fixing a specified time, nor have courts of equity mentioned any definite time as a bar. The principle is that laches should defeat the right to a review, and the time to constitute laches ordinarily, is the time for an appeal or writ of error.

Where the delay is sufficiently accounted for, the right to file a bill of review exists after the time for appeal has expired.

*Buckner* v. *Forquer*, 7 Dana, 51.

Exceptions where time has been fixed by statutes, have been allowed by this court.

In *Hanger* v. *Abbott*, 6 Wal., 532, it was held that a statute of limitations did not apply to a party residing out of a rebellious State, so as to prevent him from suing a person residing in one of them; and, in The Protector, 9 Wal., 687, the same rule is applied to the statutes limiting the time for appeal.

When, therefore, the question arises, not upon a statutory bar, but on a rule adopted from analogy by courts of equity, it is clear that if the delay is sufficiently accounted for, relief will not be denied for that reason.

What are the facts? The decree was rendered June 5,

1875, and Ricker did not know it contained the provision now complained of until January, 1878, when the time for appeal had expired. The fact that he did not know the contents of the decree, did not result from any neglect of Ricker. He appeared at the final hearing, when the court decided in his favor, and entered a decree. A draft of a decree for sale in accordance with that decision and order, was submitted to his solicitor, and it was agreed that it should be entered. According to the practice and rules of a court of equity, no other could be entered. It is true, the solicitor did not read the record of the decree after it was extended in one of the books, but the court will take judicial notice of the fact, that solicitors seldom, if ever, examine the books, to see whether the clerk has performed his duty.

The execution of the decree was immediately suspended by the appeal of Orvis, so there was nothing to require an examination of the record until after the time for appeal had expired.

The discovery was made in January, 1878, and application was made as soon as the first decision on Orvis' appeal was made, and repeated within a few days after the second opinion. Fourteen months passed after the discovery, but during that time, the cause was in this court on the appeal by Orvis, in which the court found error.

The only other objection made to filing the bill of review, is that presented by Powell's counsel, resting on the fact that Ricker has not paid Powell his money. This point I will consider at a later stage of the argument.

## III.

LEAVE SHOULD HAVE BEEN GRANTED TO FILE THE BILL OF REVIEW, BECAUSE OF ACCIDENT AND SURPRISE, AND ON THE GROUND OF NEWLY-DISCOVERED EVIDENCE.

I refer to Mr. Fuller's argument, pp. 34–38, for a statement of new evidence, and the accident and surprise. There can be no doubt as to the sufficiency of the bill on these points.

But counsel answer that the appellant, Ricker, could have discovered the facts earlier—the new evidence, on the former hearing by the exercise of proper diligence. It is asserted, that an examination of Walker, when he was testifying, would have elicited the facts.

The complete reply is, that the right of the anonymous estate of Rogers, Greenebaum and Foreman, to be postponed in the order of sale, was not in issue. More, the question of sale of the property, according to the rule of the inverse order of alienation, was not in issue. Evidence on such matters would have been irrelevant, and, if taken, could not have been read in evidence.

The newly discovered evidence in this case cannot be treated as in the ordinary instance of a motion for new trial or petition for rehearing, when the matter complained of has been put in issue by the pleadings and upon the facts, and a decision arrived at in reference thereto. On the contrary, there was no issue in the case in reference to the estate and title created under the Rogers trust deed, nor any reported on by the Master in either his original or amended report, so far as this record discloses, nor any argument had before the court upon the subject, so that the evidence, while in fact newly discovered, could not properly be treated by the court below as falling into the same cat-

egory, as if the matter had *originally* been *in issue* and heard and determined. In other words, the court had no discretion to refuse leave on the ground that this evidence was adduced to procure a rehearing of what had *already been heard*, for the question was never mooted and never heard.

In section 415, of Judge STORY's Eq. Pleadings, the language of Lord Redesdale is quoted that: "It has been "questioned whether the discovery of new matter, not in "issue in the cause, in which a decree has been made, could "be the ground of a bill of review; and whether the new mat- "ter on which bills of review have been founded, has not "always been new matter to be used as evidence to prove "matter in issue in some manner, in the original bill. A "case indeed can rarely happen in which new matter dis- "covered, would not be in some degree evidence of mat- "ter in issue in the original cause, *if the pleadings were* "*properly framed.* * * * But if a case were "to arise in which the new matter discovered could not "be evidence of any matter in issue in the original cause, "and yet clearly demonstrated error in the decree, it "should seem that it might be used as ground for a bill of "review, if relief could not be otherwise obtained. It is "scarcely possible, however, that such a case should arise "which might not be deemed *in some degree a case of* "*fraud*, and the decree impeachable on that ground." And Judge STORY says (§ 416): "The doctrine here asserted "by Lord Redesdale, seems now to be fully confirmed; "and it has been established that matter discovered after "a decree has been made, although not capable of being "used as evidence of anything which was previously in "issue in the cause, but constituting an entirely new issue, "may yet be the subject of a bill of review, or of a supple- "mental bill in the nature of a bill of review."

In support of this rule, Judge STORY cites the case of

*Partridge* v. *Osborne*, 5 Russell, 195. In that case it was held:

" A purchaser who was defendant in a suit for specific " performance, did not in his answer mention any *warranty* " *given, or representation* made by the vendor, and insisted " *merely* that a good title was not shown; a reference on " the question of title was ordered; the Master reported " in favor of the title, and a decree for specific perform- " ance was pronounced. After the order of reference had " been made, the defendant, discovered that the timber on " the estate, which constituted its principal value, was " much less in quantity than it had been represented to be " in a statement, the accuracy of which was alleged to " have been warranted at the sale; but the fact of such " warranty having been given was strongly controverted; " under these circumstances leave was given to file a sup- " plemental bill in the nature of a bill of review, *in order* " *that the defendant might have the same benefit of the* " *alleged warranty, as if he had originally insisted upon it* " *in his answer*."

It was powerfully argued by Mr. Sugden, that the petitioner *might, by reasonable diligence, have known* the fact of this defense before the original hearing.

Lord Chancellor LYNDHURST said, (p. 232): " As to " the question, whether the matter brought forward by this " petition, *not having been put in issue in the original cause*, " it is now competent for the petitioner to ask for the " benefit of it by means of a supplemental bill in the nature of " a bill of review, I am satisfied, by the discussion which " has taken place, that in a suit of this description, a party " may apply for such relief as this petition prays. It is " clear that Usborne was unwilling to enter into any con- " tract until he knew what was the quantity of timber on " the property; and in consequence of his application, the " auctioneer writes to his employers on the subject. They

" immediately send him the admeasurement; it was clearly " sent for the purpose of being shown to persons who were " likely to become purchasers; and it was accordingly " shown by Hoggart to Usborne. The circumstances of " this part of the transaction satisfy me that the paper was " shown to Usborne as a statement of the quantity of " timber on the property, to serve as a foundation for the " contract he was about to enter into.

" *No laches can be imputed to Usborne.* When one party " to a contract makes a positive representation, it is not laches " in the other not to proceed immediately to verify that " representation. *Until he has reason to doubt its accuracy,* " *laches* cannot commence."

Greenebaum and Foreman did not, by any pleading, claim that they had a title to a part of the mortgaged property, acquired before Ricker purchased block 14; there was no controversy upon that subject; the master did not report upon that matter; no exceptions were taken because of the failure to report; the Master's report as it stood in that respect was confirmed; a draft of a decree for sale, which did not provide for such an estate was submitted to Ricker's counsel and approved. After all this, there was interpolated in the decree of sale, an estate, title, interest, demand, &c., of Greenebaum and Foreman, in a part of block 16, and this was ordered to be sold after block 14. Orvis appealed and removed occasion to examine the decree. Ricker did not know of such a provision, until after the time for appeal had expired. When his attention was called to it, he found on investigation material evidence showing that Greenebaum and Foreman had no priority over him in equity. Ricker then applies for leave to file a bill of review, or a bill in that nature, on the ground of error apparent of record, accident and surprise, and newly discovered evidence.

He is met by the objection that he has been guilty of

such laches, that a court of equity will and must deny the application. If permission cannot be obtained on such a state of facts, then it would be useless to expect to present a case where it could be.

## IV.

### Performance of the decree not required of Ricker as a condition precedent to the right to file a bill of review.

Counsel for Powell assume indignation at the injustice done to him in a controversy between defendants, and seem to think he is an innocent and indifferent party, wholly irresponsible for the errors in the record.

Authorities are cited to the effect that the decree must be obeyed and performed before a complaining party can file a bill of review.

I reply to these positions:—

*First.* Powell is responsible for the nature of this decree, and must suffer the consequences of the errors committed to the injury of Ricker.

Powell had a promissory note of the two Walkers, past due, and secured by a mortgage on twenty acres of land, which had been subdivided and conveyed to different parties at different times, subject to the mortgage. He was entitled to payment of the note from the Walkers, and to a decree for the sale of the lands, if the money was not paid by the makers of the note. There was the equitable right of redemption in the several owners of the land, and a sale could be prevented by payment of the amount due. No one of the owners was liable to Powell for his debt, or any part of it. A decree for payment could not be entered against them or any one of them. Powell had the right to foreclose the equity of redemption in the premises.

In order to do so, the law required him to apply to a court of equity, giving the persons whose rights were to be affected, the right to be heard. He could not obtain a strict foreclosure, or deprive the owners and their creditors of the statutory right of redemption. He could only proceed by taking a decree to sell the land, with leave to redeem from the sale. It may be doubted whether in a case like this a court would or could order a sale *en masse*, without regard to separate ownership; but for the purpose of argument, it may be conceded that such a decree of sale would be regular. That is the kind of relief Powell asked in his bill, but that was not the kind of decree he asked and obtained of the court. Powell could have excepted to the report of the master, and objected to selling in parcels, and in the order named, for the reason that it was not in accordance with the prayer of his bill, or of any cross-bill. But he failed to do this, and not only acquiesced in it, but took his decree for a sale in parcels. Suppose he had set up in his bill the several sales, and asked to foreclose the equity of redemption in the only mode permitted by law—a sale. It would then be incumbent on him to ask and take a decree, as to the order of sale, which would be equitable to all the parties. Instead of pursuing the right course, Powell pursued the wrong one. This court has already decided the decree erroneous, in the attempt to cut off the statutory redemption. With equal propriety, counsel might have taken the position before that decision as now. Granted that he is entitled to his money, but he must get it from the men who promised to pay, and when he undertakes to resort to the land pledged as security, he must do it in accordance with rules of equity. This he has not done. If he had taken the decree asked for in his bill for the sale of the land *en masse*, Ricker would not complain. But he does complain of a decree not sought in any pleading, and which estops him on a question concerning which he had no hearing. It

Powell will accept from Ricker the proportion necessary to protect block 14 from sale, he can have his money at once, but this decree in effect compels Ricker to pay the whole of the debt.

*Seeond.* Ricker was not required by the decree to pay any money or to do any act.

The decree ordered "that unless the said Henry H. "Walker, or some of the other defendants, pay, or cause "to be paid to the complainant within one hundred days "from the entry of this decree, the said sum so found to be "due to complainant * * * * the said mortgaged "premises, or so much of the same as may be necessary "for the payment of the amount due on said mortgage, "with costs of this suit, be sold at public auction * * * "that said master first offer said premises separately and "in parcels in the manner and order hereinbetore pro-"vided."

It will be seen that Ricker was not required to perform anything, and that one hundred days were allowed in which the privilege of payment to redeem could be exercised by the defendants, or any of them.

The appeal was taken by Orvis before the expiration of the one hundred days, and by this means performance of the decree was stayed until May 15, 1879, when the mandate of this court was filed.

*Third.* Ricker could not pay the money due to Powell without relinquishing his right to object to the decree for error.

The authorities cited by counsel for Powell show an exception to the rule requiring performance before a bill of review can be filed. If Ricker were to pay the decree, his right to litigate the question of priority with Greenebaum and Foreman would be annihilated, because that

priority is determined by the decree, and payment to Powell would waive the right to litigate that question.

Counsel for Powell say that Ricker would be subrogated to Powell's rights if he paid the debt, but that is not true unless there was a preliminary order preserving that right, and no such order was made. If the court below had allowed the bill of review to be filed upon condition that Ricker paid the money to Powell, and subrogating Ricker to Powell's position, there would be force in the proposition of counsel.

What Judge STORY says (Eq. Pl., § 406), is in effect, that where the performance of the decree would extinguish the party's right, "*those* parts of the decree are to be "spared until the bill of review be determined. But "such sparing is to be warranted by public order made in "court."

This is ample authority for an order upon the bill of review for payment to be so made as to preserve Ricker's rights. In the absence of such order he could not safely pay.

This question of performance was considered at length by Lord LYNDHURST in *Partridge* v. *Usborne*, 5 Russell, 195, which was argued by able counsel on both sides. Lord LYNDHURST held that "a party may obtain leave to "file, and may file, a supplemental bill in the nature of a "bill of review, though he has *not performed* the decree "in the original cause, if the proceedings under the de-"cree are not *at the time* in such a state as to enable the "adverse party to bring him into default for not having "done what the decree orders." (P. 245 *et seq.*)

While the matter was pending the bill of review was filed and a motion made to take it off the file. This motion was *overruled.*

Lord LYNDHURST says (p. 252): "Whatever the

"party is bound to do *at the time*, when the bill of review "is put upon file, all that he must do before the bill is filed. "But as the permission to file a bill of review is always "given upon the assumption, and the implied understand- "ing and engagement that the original decree shall be "performed, I am also of opinion that if, after the bill is "filed, the period arriving when the money ought to be "paid, it is incumbent upon the party to pay that money; "otherwise, an application to dismiss the bill may be made "to the court on that ground—he having filed the bill "upon an understanding and engagement which he has "failed to comply with. * * It does not appear to me "that there has been any default on the part of the plaintiff "*in the new suit*; it does not appear to me that, *at the time* "when the bill was put upon the file, it was incumbent "upon him to have paid the money. As that does not ap- "pear, I think there is not sufficient to justify me, upon "the facts as they stand, to direct the bill to be taken off "the file. If it should turn out, however, upon the result "of inquiry, when the period for the payment of the money "shall arrive, or now, if the period has already arrived, "that the money has not been paid, and an application is "made to me founded on the default, that would lead me "to a different consideration of the subject; and I might, "under those circumstances, direct that no further proceed- "ings should take place under the bill of review, *till the* "*money was paid*."

## V.

### The motion to dismiss the appeal.

The appellees have entered a motion to dismiss the appeal, based on the proposition that no application for leave to file a bill of review for errors apparent need be made, and that one for leave to file on the ground of newly discovered evidence is addressed to the discretion of the

court, and the exercise of such discretion is not reviewable in this court.

It is true a bill of review for errors apparent may be filed as a matter of right, and if improperly placed on file, it may be removed by a motion which stands in the place of a demurrer. But the refusal of a judge to allow a bill to be filed which controls the action of the clerk, is equivalent to an order to take it from the file; therefore, in this case, if there was error apparent of record, and the time had not expired in which a bill could be filed, the action of the court was the same as if a demurrer or motion had been sustained.

The other proposition is, that the appeal ought to be dismissed, because one of the grounds for the bill of review was newly discovered evidence, and therefore leave to file it had to be asked, and the *refusal* of such leave cannot be assigned for error, because the granting or refusing of leave is discretionary, and because the order refusing leave is not an order made in any case.

To this I answer :

*First.* That it is only where the bill of review is founded on newly discovered evidence *alone* that leave to file it must be applied for; while in the case at bar the bill embraces error of law apparent, and fraud, accident or surprise, as well as newly discovered evidence, and therefore could have been filed without leave.

*Griggs* v. *Gear*, 3 Gilman (Ill.), 2, and cases.
Mitford & Tyler's Eq. Pl. & Pr., 181.
Story's Eq. Pl., § 405.

The refusal of leave in this case is exactly as if the bill had been filed and dismissed upon demurrer.

*Second.* That even if the bill were grounded on newly-discovered evidence *only*, the decision of the Circuit Court would be subject to review.

A bill of review, or in that nature is clearly a new suit. It is so stated by Lord LYNDHURST, in *Partridge* v. *Usborne*, *supra*, and must necessarily be so treated, whether it be considered as in the nature of a writ of error, or otherwise.

The discretion which the court has in reference to bills of review of this class, is a *legal* discretion, subject to correction and control by the Appellate Court. The denial of Ricker's application to file his bill of review, was a final determination of his rights, so far as he had any under the newly-discovered evidence, as final as if the court had permitted the bill to be filed, and subsequently under the evidence, dismissed it. The tendered bill of review was in effect a new suit. Its rejection was a final disposition of such new suit upon its merits. And hence, this case is clearly distinguishable from those in which the general rule has been announced, that the Supreme Court will not review the action of the lower court as to matters of mere discretion.

This distinction is recognized by this court in *Fuller* v. *Claflin*, 93 U. S., 14, which is almost exactly in point, even to answering the suggestion of counsel, that because where leave is granted, the decision cannot be assigned for error, therefore it cannot where leave is refused, for the court say: "the rule has sometimes been held to apply to an "order *refusing* to strike out an answer. But it does not "apply to an order which *strikes out* an answer." Why? "Because that *is the ending of the cause*."

In *Etheridge* v. *Hall*, 7 Porter (Ala.), 47, a writ of error was sustained to a refusal to allow a mandamus. The court say, "that there is no reasonable distinction between "*refusing* to grant a writ, by which the parties' rights "could be ascertained, and an erroneous judgment, by "which they might be compromited."

See also *State* v. *Bennett*, 2 Ala., 140.

And in Illinois, it has been held, that under the statute of that State, in relation to *quo warranto*, as well as under the statute of Anne, leave to file an information is within the discretion of the court, but that refusal of leave is reviewable on error, because it is not a matter of *mere* discretion, but of sound discretion according to law, and the refusal is a final ending of the case.

*People, &c.* v. *Callaghan*, 83 Ill., 128.
*People, &c.* v. *Waite*, 70 Ill., 25.

And it is also held, that "*in chancery*, all matters, whether "of discretion or positive law, are subject to review in a "Superior Court."

*Moore* v. *Bracken*, 27 Ill., 26.

*Third.* The newly-discovered evidence in this case cannot be treated as in the ordinary instance of a motion for new trial, or petition for rehearing, where the matter complained of has been put in issue by the pleadings, or upon the facts, and a decision arrived at in reference thereto. On the contrary, there was no issue in the case in reference to the estate and title created under the Rogers trust deed, nor any reported on by the master, in either his original or amended report, so far as this record discloses, nor any argument had before the court upon the subject, so that the evidence, while in fact newly-discovered, could not properly be treated by the court below as falling into the same category as if the matter had *originally* been *in issue*, and heard and determined. In other words, the court had no discretion to refuse leave, on the ground that this evidence was adduced to procure a rehearing of what had *already been heard*, for the question was never heard.

*Fourth.* The bill is based on the ground of fraud, accident and surprise. It was not necessary to have leave to file a bill of this nature. The refusal of the court to

allow the bill to be filed was equivalent to dismissing it, and is, in effect, a final decree upon the right set up in the bill. From such a decree an appeal clearly lies.

## VI.

### Conclusion.

The argument of counsel for appellee, Powell, ignores, and that of counsel for Greenebaum and Foreman misstates the actual facts in reference to the matter of which Ricker complains, as those facts are disclosed by the record.

What Ricker complains of upon the merits is, that the north 201 feet of block 16 was directed in the decree *as entered*, to be sold, subject to the estate and title of Rogers, Greenebaum and Foreman, created by the Rogers trust deed, and that block 14 is directed to be sold *before* this estate and title so carved out of the north 201 feet of said block 16.

And it cannot be too *strongly impressed upon the court* that there was *no issue upon the pleadings*, and *no issue upon the facts in reference to this estate and title*, created by the *Rogers trust deed; no report made by the Master upon that subject; no hearing had by the court upon it*, and that it made its first appearance in the decree as *entered*, which is *not* the decree ordered upon *final hearing*, so that Ricker has never had any opportunity to adduce evidence or submit argument upon the question.

Yet here is a decree which, in its present shape, absolutely precludes any future contest upon the point, although the error is manifest and fatal.

And every branch of the argument for the appellees is

affected by the false assumption that this interpolated estate was a matter in issue in the court below.

Upon the questions whether appellant was barred by lapse of time, or by laches, or whether his newly discovered evidence might have been discovered before, it is of vital importance that the court should understand that this anonymous Rogers and Greenebaum and Foreman estate was not a matter in controversy until its interpolation into the decree as entered made it so.

W. C. GOUDY,

*For Appellant.*

## Supreme Court of the United States.

No. 35.—OCTOBER TERM, 1878.

Emerson G. Orvis, *Appellant*, vs. Nathan Powell. } *Appeal from the Circuit Court of the United States, for the Northern District of Illinois.*

Mr. Justice Miller delivered the opinion of the Court:

The appellant, Orvis, was granted a re-argument in this case because the question of the order of subjecting lands mortgaged, and sold subsequently by the mortgagor, to different parties at different dates, to satisfaction of the mortgage debt, was a new one in this Court, and because the subsequent sales on which the court had to pass in the case were numerous, and, as presented by the record, a little perplexing.

Since the re-argument was allowed, appellant makes application for a writ of certiorari to bring up a paper found in the clerk's office of the court below, which he considers important.

That paper, of which a photgraphic copy is presented to us seems to have been the original draft of the final decree presented to the judge for his approval. It has written on its back, "Draft of decree for sale," with a date, and the word "Enter," followed by the initials of the judge who rendered the decree. It has erasures and interlineations in its body, and additions on its margin, and because these do not seem to be in the same handwriting as the body of the instrument, we are asked to presume that, though the decree as entered corresponds with these changes, it is by fraud or forgery that it is done. The paper itself is no part of the record of the case. It is obviously what it purports to be, a draft

for a decree, no doubt submitted to the judge, and changed by him to suit his views, or possibly by suggestions of counsel on the other side. There is absolutely not the slightest reason to show that the decree as thus altered or amended was not the one intended to be entered by the judge, or that it is not the one in the record now before us. But suppose it was a fraud upon the court or upon the other side, we could do nothing in the matter, even if the original of this paper was now before us. We cannot here correct the record of the circuit court and make a record for it. Nor do we see any reason to delay the case or remit it to that court, for there is not the slightest evidence of any wrong. It would be a very dangerous precedent to set, that whenever the rough draft of a decree which the judge orders to be entered, shall two years afterwards be found to contain erasures and interlineations, this court will stop proceedings and direct an inquiry into the circumstances under which those changes were made.

On the re-argument, it is urged by appellant that the mortgage debt of Walker to Powell, on which the decree was rendered, was contracted for the purchase of an undivided fourth part of the land covered by the mortgage, while the mortgage covers the whole interest.

1. But it does not appear that the mortgage *was* given for the purchase-money at all. No such thing is stated in any deed in the record or any such averment in the bill or answer.

2. If Powell had conveyed only the undivided fourth, and taken a mortgage on the whole of it, such mortgage is valid, as Powell had a right to require the entire interest as security for the part sold.

3. There is no deed from Powell to Walker in the rec-

ord, and in the short abstract of title found in the master's report of such a deed, it is obvious that the (*und. ¼ of the S. W. ¼*) is an error in printing or transcribing for the (N. E. ¼ of the S. W. ¼), which is the description also in the mortgage.

But whereas on the former hearing the principal effort of counsel was directed to showing that block 18 of the subdivision of the land covered by the mortgage should have been ordered to be sold before the property of the appellant, the contest is now between block 14 and the appellant's property.

The piece of the mortgaged property ordered to be first sold in satisfaction of the mortgage debt is the south 100 feet of block 16, of Packer's subdivision, which was owned by appellant. His title is a deed with covenant of warranty from H. H. Walker, the mortgagor and defendant in this suit, dated Feb. 26, and recorded April 9, 1874. This is the latest conveyance by Walker of any of the land covered by the mortgage, and when it was made left none of it in his ownership. It should, therefore, be first subjected to the payment of Powell's mortgage, according to the rule of the inverse order of sales, unless there is some sufficient reason to the contrary. The last piece of the land conveyed by Samuel Walker previous to this conveyance to Orvis was block 14, to S. A. Ricker, by deed of Feb. 25, 1873. As between the two parcels, it is argued by the counsel for Orvis, that when Ricker bought block 14 the title to block 16 had been previously conveyed to John D. Kinney, April 25, 1872, and it so appears by the record. If matters had remained in this condition when the decree of foreclosure was rendered, Ricker's block should have been first subjected to sale by the rule of the inverse order of sale by the mortgagor.

But in point of fact it appears that on the 26th Feb., 1874, Orvis made an agreement in writing with both Sam-

uel J. Walker and Henry H. Walker for the purchase of the 100 feet of block 16 now in question, and on the same day Henry H. Walker, the original mortgagor, made him a deed in fulfillment of that contract, with covenants of warranty. While the contract of purchase with Samuel and H. H. Walker was recorded the day it was made, the deed from H. H. Walker was not recorded until April 9.

In the meantime John D. Kinney quit-claimed this 100 feet of block 16 to H. H. Walker on the 6th day of March, and on the 8th day of April procured a release from John G. Rogers of a deed of trust for that part of block 16.

There can be little doubt that the agreement for a purchase by Orvis from both the Walkers, the deed from Kinney to Henry Walker, the release of the deed of trust on the property by Rogers, and the warranty deed by H. H. Walker to Orvis, were parts of the transaction.

It shows quite plainly that the piece of land originally mortgaged by Henry Walker to Powell to secure notes made by Henry and Samuel Walker, after it had once been sold by the Walkers, came back to Henry Walker, with a fee-simple title, freed from all other incumbrance but the original mortgage. Being liable to that mortgage in his hands it was liable before any other piece of the land first mortgaged was equitably liable in the hands of others. Coming thus to their hands, or to speak more properly, to the hands of Henry H. Walker, the priority of liability for the original mortgage became re-attached to it. Mr. Orvis took it, therefore, subject to the original mortgage, which is not denied, but so subject before that of others whose title had been acquired before his.

And this view of the subject is the same whether we regard Samuel J. Walker the real sub-vendee or Henry Walker as the principal party. Orvis contracted with both, took covenants of warranty from both, and in any

event the title in H. H. Walker's hands became legally liable to the mortgage he himself had given in exoneration of all that he had previously conveyed.

The same decree will be entered that was made on the former hearing.

IN THE

# Supreme Court of the United States,

OCTOBER TERM, A. D. 1879.

SHERMAN A. RICKER,
*Appellant,*
*v.*
NATHAN POWELL, ELIAS GREENEBAUM, AND GERHARD FOREMAN,
*Appellees.*

Appeal from Circuit Court of U. S. Northern District of Illinois.

## MOTION AND BRIEF, BY APPELLEES.

JULIUS ROSENTHAL,
A. M. PENCE,
*For Appellees, Greenebaum & Foreman.*

BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET, CHICAGO.

1879.

IN THE

# Supreme Court of the United States,

OCTOBER TERM, A. D. 1879.

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|---|---|
| SHERMAN A. RICKER, *Appellant,* v. NATHAN POWELL, ELIAS GREENEBAUM, AND GERHARD FOREMAN, *Appellees.* | Appeal from Circuit Court of U. S. Northern District of Illinois. |

## Motion and Brief, by Appellees.

And now come said appellees, Elias Greenebaum and Gerhard Foreman, by Julius Rosenthal and A. M. Pence, their solicitors, and move the court to dismiss said appeal taken in said cause, for the reasons following:

1st. Because the granting or refusing leave to file a bill of review is discretionary, and a matter of discretion will not be reviewed by said court.

2d. It is not a final judgment in any pending cause, and hence cannot be reviewed by said court.

JULIUS ROSENTHAL,
A. M. PENCE,
*Sol'rs for Defendants in Error,*
ELIAS GREENEBAUM,
GERHARD FOREMAN.

## I.

The case of *Orvis* v. *Powell*, was determined by this Court at the last term. And after its determination and affirmance of the decree of the Circuit Court, Sherman A. Ricker, one of the defendants who did not appeal, filed his petition, asking for leave to file a bill of review.

He set up as one of the grounds for the relief sought, an allegation of newly discovered evidence, on account of which, he was compelled to ask leave of the court to file his bill of review.

Story Eq. Pl., § 412.

The court refused such leave, and from the order refusing such leave, Ricker has prosecuted his appeal.

(*a.*) The question raised by this motion, is not whether the discretion of the court was properly or unjustly exercised, but whether, under any circumstances such discretion can be reviewed by the Supreme Court.

Mr. Justice STORY, in his Equity Pleadings, § 417, referring to Lord Bacon's Ordinance, says: "The granting "of such a bill of review for new discovered evidence, "is not a matter of right, but it rests in the sound dis- "cretion of the court. It may, therefore, be refused, "*although the facts, if admitted, would change the decree,* "when the court, looking to all the circumstances, shall "deem it productive of mischief to innocent parties, or "for any other cause unadvisable."

It will be admitted, and such is the unbroken line of decisions in this court, that a matter which rests in the discretion of the court below, will not be reviewed in this court.

*Marine Ins. Co.* v. *Hodgson*, 6 Cranch, 217.
*Marine Ins. Co.* v. *Young*, 5 Cranch, 187.
*Matthewson* v. *Grant*, 2 How., 263.
*Thomas* v. *Harvie's Heirs*, 10 Wheat, 151.

*Newcomb* v. *Wood*, 97 U. S., 582.
*Steines* v. *Franklin Co.*, 14 Wall., 22.
*Buffington* v. *Harvey*, 95 U. S., 99.
*Rubber Co.* v. *Goodyear*, 9 Wall., 806.

In the *Marine Ins. Co.* v. *Hodgson*, this Court, at an early day, said :

" This Court does not think that the refusal of an infe-
" rior court to receive an additional plea, or to amend one
" already filed, can ever be assigned for error. This de-
" pends so much on the discretion of the court below,
" which must be regulated more by the particular circum-
" stances of every case than by any precise and known
" rule of law, and of which the Superior Court can never
" become fully possessed, that there would be more danger
" of injury in revising matters of this kind than what might
" result now and then from an arbitrary or improper exer-
" cise of this discretion. It may be very hard not to grant
" a new trial, or not to continue a cause, but in neither case
" can the party be relieved by a writ of error, nor is the
" court apprised that a refusal to amend or to add to a
" plea was ever made the subject of complaint in this way."

In *Matthewson* v. *Grant*, this Court, Mr. Justice STORY delivering the opinion, said :

" The question of amendment *was a question of discre-*
" *tion in the court below* upon its own review of the facts in
" evidence ; *and we know of no right or authority in this*
" *Court upon a writ of error to examine such a question, or*
" *the conclusion to which the court below arrived upon a sur-*
" *vey of the facts.*"

In regard to this question, when arising in chancery cases, the same principle applies as in actions at law.

In *Steines* v. *Franklin Co.*, 14 Wall., 22, this Court said:

" Necessary jurisdictional allegations cannot properly be
" introduced for the first time on a motion for a re-hearing,

" as the motion itself is one addressed to the discretion of " the court, and one in which the decision of the court, in " granting or refusing it, is not subject to review in the " appellate court. Such a motion is not founded in matter " of right, but rests in the sound discretion of the court. " Matters resting on the discretion of a subordinate court " cannot be assigned for error in the appellate court. Ex- " ceptions do not lie to the granting or refusing a new trial " in a suit at law ; nor will an appeal lie from the circuit to " this Court from an order of the Circuit Court in grant- " ing or refusing a petition for re-hearing in an " equity suit, for the same reason, which is, that the mo- " tion in one case, or the petition or motion in the other, is " alike addressed to the discretion of the court, as shown " by all the decisions of the federal courts."

The same question is decided the same way and for the same reason in *Buffington* v. *Harvey*, 95 U. S., 100. In that case this Court say :

" The granting of a re-hearing is always in the sound " discretion of the court, and, therefore, granting or refus- " ing it, furnishes no ground of appeal."

No difference can be perceived in principle between the exercise of a discretion in refusing a re-hearing after decree passed, but before enrollment, and in refusing a re-hearing after the enrollment, by refusal to permit the bill of review to be filed. It is the exercise of a discretion in either case.

But we are not without exact authority upon this point of discretion.

In *Thomas* v. *Harvie's heirs*, a bill of review was filed by leave of the court, on the ground of new discovered evidence. In that case this court said:

" Whether a bill of review founded upon matter dis- " covered since the decree, is in like manner barred by

" the lapse of five (two) years after such decree, is a ques-
" tion which need not be decided in the present case, *since*
" *we are* ALL *of opinion that it is in the discretion of the*
" *court to grant leave to file a bill of review for that cause.*"

Hence in that case the court refused to consider whether the leave was properly or improperly given, it being a matter of discretion which this court could not review.

Mr. Justice Story, in his Equity Pl., § 419, speaks of the improbability of having the decisions of an appellate court upon the exact question as to whether the limitation as to appeals will be applied by analogy as a bar to a bill of review for *new discovered evidence*, for he says, " as the " allowance of a bill of review for new discovered evidence " is *discretionary* with the court, it is scarcely probable that " it will arise in judgment as the lapse of time will always " have great weight with the court in refusing the applica-" tion." That is, the author means that leave being always refused after such lapse of time, there is no way for the appellate court to determine the question, as an appeal would not lie from an order refusing leave to file such refusal, it being a matter of discretion.

In *The Rubber Co.* v. *Goodyear*, 9 Wall., 806, this court say: " Whether such an application shall be granted or " refused rests in the sound discretion of the court. The " requisite leave is never a matter of right."

It may be claimed that the court below might do a great wrong in refusing such leave. So the court could do a great wrong in refusing defendant leave to file an additional special plea, setting up a good defense, but this court holds that the exercise of such a discretion cannot be reviewed. So the court below would be doing a great wrong in refusing a new trial at law when the verdict was manifestly against the evidence, or in refusing a rehearing in chancery upon the ground of newly discovered evidence, but in

such case this court steadily refuses to review the action of the lower court.

The action of the lower court is an exercise of discretion in such case, for which the judge must render an account to his own conscience alone. These are established principles which cannot be departed from.

(*b.*) We submit that the order refusing leave is not a final order made in any case. The petition filed is not a new case. It has no parties; no process issues to bring in any parties. It is simply filed in the old case, in which a final decree was long since rendered, asking the favor of the court. The refusal of leave is no more a final adjudication than the granting of leave to file such bill, and no one will pretend that the parties in interest could appeal from an order granting leave to file a bill of review. In either case, in the refusing or the granting, it is simply a discretion exercised by the court. We submit that the appeal should be dismissed upon this motion.

## II.

If the foregoing motion should not prevail, then we submit the following:

The decree in the case of *Powell* v. *Walker* was appealed to this court, and heard under the title of *Orvis* v. *Powell.* The decree of the Circuit Court was affirmed.

A rehearing was granted, and on April 28. 1879, the decree was again affirmed. Two opinions were delivered by this court. One will be found and the other will be found

On May 21, 1879, four years after the final decree, appellant here filed a petition, asking for leave to file a bill of review, on two grounds.

*First.* For error apparent on the record.

*Second.* On the ground of new discovered evidence.

We wish to call the attention of this court to the fact that Ricker appeared in this court, upon the appeal by Orvis, and attempted to have the decree reviewed. He tried to have that decree reviewed in every way except the right way. He did not pray an appeal to this court, nor did he seek to file a bill of review for four long years. Then, after all this litigation, after all the expense and delay in this matter, after the time has elapsed in which to take an appeal, he now proposes to again set this matter afloat, and to again delay all the parties in asserting their rights, and in the protection of their property.

The time now allowed for an appeal or writ of error is *two* years. Formerly it was five years.

(*a.*) A bill of review for errors apparent upon the face of the record, will not lie after the time when a writ of error could be brought or an appeal could be taken, for courts of equity govern themselves in this particular by the analogy of the common law in regard to writs of error. For the same reason in the courts of the United States bills of review for errors apparent upon the face of the decree are limited to two years, that being the limitation of writs of error upon judgments at law.

Story's Equity Pleading, Sec. 410.
*Boyd* v. *Vanderkemp*, 1 Barb. Ch., 273.
*Thomas* v. *Harvies' heirs*, 10 Wheaton, 146.

In the case of *Thomas* against *Harvies' heirs*, the Supreme Court of the United States say: "It must be admitted that bills of review are not strictly within any "statutes of limitations prescribed by Congress, but it is "unquestionable that courts of equity acting upon the "principle that laches and neglect ought to be discounte-

" nanced, and that in cases of stale demands its aid ought " not to be afforded, have always interposed some limita- " tions to suits brought in those courts. It is stated by " Lord Camden, in the case of *Smith* v. *Clay*, Ambler, " 645, 'that as the court of equity has no legislative au- " thority, it could not properly define the time of bar by a " positive rule, but that as often as parliament had limited " the time of actions and remedies to a certain period in " legal proceedings, that the Court of Chancery adopted " that rule, and applied it to similar cases in equity.' These " principles seem to apply, too, with peculiar strength to " bills of review in courts of the United States from the cir- " cumstance that Congress has thought proper to limit " the time in which appeals may be taken in equity cases, " thus creating an analogy between the two remedies by " appeal, and a bill of review, so apparent that the court " is constrained to consider the latter as necessarily com- " prehended within the equity of the provisions respecting " the former. For it is obvious that if a bill of review to re- " verse a decree on the ground of error apparent on its " face, may be filed at any period of time beyond the five " (two) years' limit for an appeal; it will follow that the " original decree may, in effect, be brought before the Su- " preme Court for re-examination after the period pre- " scribed by law for an appeal from such decree, by ap- " pealing from the decree of the Circuit Court upon a bill " of review. In short, the party complaining of the origi- " nal decree would in this way be permitted to do indi- " rectly what the act of Congress had prohibited him from " doing directly."

So we see that, without looking into the record or passing upon the merits, the lapse of two years after rendition of the decree, will bar an appeal or writ of error, and hence no bill of review, in analogy to the statute, can be permitted. This is the rule adopted, without deviation, in cases

where the review is sought on the ground of error apparent upon the record. Four years have elapsed in this case.

(*b.*) If we look into the record and waive the lapse of time, we will find the case without merit.

"In regard to errors of law apparent upon the face of "the decree, the established doctrine is that you can not "look into the evidence in the case in order to show the "decree to be erroneous in its statement of facts. That "is the proper office of the court upon an appeal; but "taking the facts to be as they are stated to be on the "face of the decree, you must show that the court has "erred in point of law. If, therefore, the decree do not "contain a statement of the material facts on which the "decree proceeds, it is plain that there can be no relief by "a bill of review, but only by an appeal to some superior "tribunal."

Story's Equity Pleading, Sec. 407.
*Dexter* v. *Arnold*, 5 Mason, 311.
*Evans* v. *Clement*, 14 Ill., 206.

Because of the fact that under the rule of this court no facts are found by the decree, this court has extended the language of this rule above quoted, as will be found by reference to

*Whitney* v. *Bank of U. S.*, 13 Pet., 6.
*Putnam* v. *Day*, 22 Wall., 60.

So that now the rule as to errors apparent upon the record, is expressed as follows:

"The bill, answer and other pleadings, together with "decree, constitute what is properly considered as the "record, so that the bill of review for error apparent must "be founded upon these, and the evidence cannot be gone "into in order to establish an objection to the decree founded "upon the supposed mistake of the court in its own de-"ductions from the evidence."

To show error apparent upon the face of the record, counsel for appellant, on page 14 of his brief, attempts to show *from the evidence*—from the deeds introduced in evidence—that the court erred as to what was the inverse order of alienation of the premises sought to be sold, which is the only question raised in the entire case.

There is no pretense that it appears anywhere in the pleadings, or in the decree, that Ricker's interest was acquired prior, in point of time, to the interest of Greenebaum and Foreman, or to the interest of Kinney, under whom Greenebaum and Foreman claim. Upon the contrary, the answer of Greenebaum and Foreman alleges that Kinney acquired title to block 16 by deed from Walker, bearing date November 25, 1872, which was recorded December 2, 1872; and that Kinney executed his note of the same date, due in three years, for $12,000, and executed trust deed to secure the same, on the same day, which trust deed was recorded October 23, 1873, and that they, Greenebaum and Foreman, for a valuable consideration, acquired the title to said note so secured. The note was not due when the answer was filed. (See Rec., p. ~~34~~)

The answer of Ricker set up that he acquired block 14 by deed from Walker, bearing date February ~~25~~, 1873, recorded ~~April 5, 1873~~ (Rec., p. ~~32~~), the record of which was four months after the record of the deed to Kinney, under which Greenebaum & Foreman claim.

The decree orders the sale of the interest of Greenebaum and Foreman, after the sale of the interest of Ricker, which, according to the record, is in the inverse order.

Counsel claims that although the record of the deed to Kinney of block 16 was prior to the record of the deed to Ricker of block 14, yet that the trust deed securing the Greenebaum and Foreman note, was not filed for record until after the record of the Ricker deed. True, there

is no evidence in that record as to when the Kinney note was sold to Greenebaum & Foreman, nor could we look at it if there were, to discover errors apparent, but the presumption of law is, that a note was endorsed and delivered at its date, which was four months prior to the deed to Ricker.

*Stewart* v. *Smith*, 28 Ill., 397.
*White* v. *Weaver*, 41 Ill., 409.
1 Daniel Neg. Inst., § 728.

But, the court making the order it did, the presumption is that the court so found the facts, and the rule is different in such a case from what it is upon appeal. In the latter case the facts must support the decree or it will be reversed In the case of a bill of review, the presumption is all in favor of the facts that they do support the decree, unless the record, not the evidence, disputes such presumption. We have seen nothing in the record disputing the presumption that Greenebaum & Foreman were prior to Ricker in the acquisition of their rights; besides, they claim under Kinney, and Kinney's deed is admitted upon the record to be prior and to have been filed for record prior to the deed to Ricker, and hence in point of law they are protected as against Ricker.

*Niles* v. *Harmon*, 80 Ill., 396.

It can cut no figure as to when the trust deed securing the Greenebaum & Foreman note was filed for record, so far as Walker's grantees are concerned. It was only important for their protection, as against subsequent grantees of Kinney, and before Kinney conveyed Block 16, the trust deed made by him was recorded. Greenebaum & Foreman were not bound by law to look to the order or fact of conveyances made by Walker, subsequent to the date of the record of the deed to Kinney. No man is bound to look for conveyances by his grantor subsequent to the record of the deed under which he claims title.

Could Kinney be divested of any right acquired by the deed to him after the record, by means of anything his grantor might do subsequent to the date of the record of his deed? If not, neither can Greenebaum & Foreman, who claim under Kinney. Kinney's notes were not due when Greenebaum & Foreman bought them, and hence, having no notice of any defect in them, and the record in that Powell case does not show that they had any such notice, then Kinney was bound to pay them, and was entitled to have the security subjected to their payment. He afterwards conveyed Block 16 by quit-claim, and subject to the Greenebaum & Foreman trust deed. See *Niles* v. *Harmon*, 80 Ill., 396.

But all of this going outside to support or defeat the decree, is not a discussion of errors apparent upon the face of the record. The decree will be presumed correct unless the record contradict it, as is stated in Story Eq. Pl., § 407: "If therefore, the decree (Record), do not contain a "statement of the material facts on which the decree pro- "ceeds, it is plain there can be no relief by a bill of review, "but only by appeal to some superior tribunal."

If we should go into the *evidence* in that record, we would find the order of conveyance by S. J. Walker is as follows:

1st. Block 13 to Philpot, by warranty deed, dated September 10, 1870. *Recorded December* 9, 1870.

2d. Block 17 to Ralston, by warranty deed, dated October 2, 1871. *Recorded September* 4, 1872.

3d. Block 15 to Brennock, by warranty deed, dated March 18, 1872. *Recorded October* 10, 1872.

4th. Block 16 to Kinney, by warranty deed, dated November 25, 1872. *Recorded December* 2, 1872.

5th. Block 18 to Coolbaugh & Powers, by warranty deed, dated July 1, 1872. *Recorded December* 7, 1872.

6th. Block 14 to Ricker, by warranty deed, dated February 25, 1873. *Recorded April* 5, 1873.
(See printed Record, p. .)

Which shows that Kinney, and Greenebaum & Foreman under Kinney. are prior in point of time to Ricker.

But it is useless to discuss this question, as the right to file a bill of review for errors apparent is barred by lapse of time, as heretofore shown.

## III.

The right to file a bill of review upon the ground of new discovered evidence cannot be maintained.

We have shown under our second point that the refusal to grant leave to file a bill of review on the ground of new discovered evidence is a matter of discretion and cannot be reviewed. And hence whether a bar can be asserted to such a bill of review in analogy to the statute has never been decided because this leave is a matter of discretion and not a matter of right. It is not subject to review here.

(*a.*) But even as to the question of the application of a bar the tendency seems to be to apply the bar of two years, though not distinctly decided. But it is distinctly held that " if there be any laches or negligence in this respect " that destroys the title to relief."

*Rubber Co.* v. *Goodyear*, 9 Wall., 806.
Story Eq. Pl., § 417.

The laches in the case at bar are abundant. Ricker had his attorneys defending him in the case in the court below. Mr. Fuller, his attorney, entered his appearance in the Superior Court, if we mistake not, in 1875. He admits that he received a printed copy of the record in December, 1877, or January, 1878. And that he then became aware of the

precise condition of the decree of the lower court. Not only is that so, but he attempted to assign cross-errors on behalf of Ricker in the Supreme Court, and made an argument in his behalf in this court. It was sixteen months, according to his own admission, from the time he had actual notice of the order of sale, as directed in the final decree, before he filed a petition asking for leave to file a bill of review. And it was four years from the time the final decree was entered until he moved for leave to file his bill of review. He tried all other methods but the right one. He might have appealed, or he might have filed a bill of review within two years.

What would be the value of a final decree in any case, if parties may lie by until their right of appeal is gone, or until the witnesses in a case are dead, and then come forward and be permitted again to try their case, and again have an appeal, and thus obtain the right to have their cause reviewed by the Appellate Court for five or ten years instead of two? A party will not be permitted to obtain *indirectly* what he cannot obtain *directly*. The laches in this case must operate as a complete bar to any relief.

(*b.*) "Leave will not be given to file a bill of review "upon the basis of a discovery of new matter, unless an "affidavit be filed showing that the new matter *could not "be produced or used* by the party claiming the benefit of "it in the original cause. The matter proposed to be "shown in the bill of review *must not only be new, but it "must be such as the party by the use of reasonable dili-"gence could not have known*, for if there be any laches "or negligence in this respect, that destroys the title to the "relief."

Story's Equity Pleadings, Secs. 412, 414.
*Wiser* v. *Blackley*, 2 Johnson's Chancery, 488.
*Barrow* v. *Rhinelander*, 3 Johnson's Chancery, 120.

*Livingston* v. *Hubbs*, 3 Johnson's Chancery, 124.
*Pendleton* v. *Fay*, 3 Paige, 204.
*Rubber Co.* v. *Goodyear*, 9 Wall., 806.

In the above quotation we have used the language of Mr. Justice STORY, in his work on Equity Pleadings, and this Court has said, in the case last cited, that "it is a set-"tled rule in this class of cases, that the matter must not "only be new, but such as the party, by the use of reas-"onable diligence, could not have known."

It does not appear from the affidavits filed with this petition for leave, that the new matter insisted upon by Ricker could not have been produced or used in the original cause. They say it was within the knowledge of said S. J. Walker, viz.: the time when the Kinney notes and mortgage were negotiated by him. Mr. Ricker does not show that he made any effort whatever prior to the decree to discover the time when this Kinney note and mortgage were negotiated to Greenebaum and Foreman. It does not appear that he ever inquired of Greenebaum and Foreman, or of Samuel J. Walker, as to the time when they obtained the same. All these parties testified in this cause, and it would have been a very simple matter, had counsel for Ricker deemed it of any consequence, to have asked them the question as to the date when they came into possession of the securities. But for them to neglect what they now deem an important part of their case, and then four years afterwards to come and demand a review, simply to enable them now to inquire as to facts, which they might have inquired about at that time, is simply prolonging litigation. Courts do not permit a review of decree for any such reasons. They simply state in their affidavits, that they did not then know of the date when this mortgage was negotiated, but they do not state in their affidavits that it was beyond their power at that time to

discover. They do not show *that the new matter relied on was such that, by the use of reasonable diligence, they might not have known it. It must be new matter that they could not have produced or used.* Such is the rule laid down. It appears, by their own affidavits, that they might have known of this so-called new matter, had they inquired or used reasonable diligence at the time. The fact is, they now deem that an important matter, which at the time of the hearing of the original cause they did not deem of any consequence. In other words, they are trying their case by piece-meal, and having failed the first time, they desire another opportunity to prove facts which might easily have been proven at the time.

This would be such an abuse of bills of review as could never be tolerated, and would be opening a Pandora's box to trouble this Court in the future, for no person would be very particular about presenting the whole of his case on an original hearing, if he thought he would have an opportunity, after the decree went against him, to review the same, and then bring in the balance of his case. Such has never been the law. If Ricker had used reasonable diligence, he could have known the facts which he now deems material to his case.

So far as the new discovered evidence is concerned, it is nothing more than two affidavits of S. J. Walker, as to the time when Greenebaum & Foreman received the Kinney note and trust deed. One was made by Walker March 3, 1879, and a supplemental one made May 21, 1879. The two taken together is all there is as to the new evidence. There is nothing in them upon which a bill of review can be predicated. As we have before shown, the old record is disposed of by the bar of two years, regarding the question of error apparent upon the face of the record.

Now, what is there in these two affidavits, "*showing*

"*why this new matter could not be produced or used*" by Ricker, in the original cause?

What is there in these two affidavits which show that this new matter could not have been known "by the use "of reasonable diligence"?

Let us look at it. The question in issue, was the priority of rights between Ricker and Greenebaum & Foreman.

Counsel for Ricker excepted to master's report, upon the ground that the order of sale did not suit him. He was fully aware of the issue. Does Ricker or his counsel swear that they tried to find out this question of priority, as between him and Greenebaum & Foreman, upon the original hearing?

Foreman and Greenebaum and Walker all testified in that case. Did he ask them about this question? No! Is there any reason why Walker would not have told the same thing then that he tells now? No! Is there any reason to suppose that Greenebaum & Foreman would not have told the truth as to when they obtained this security, had counsel asked them? No! Then why was it not done? Simply because counsel did not think of this question then. Hence, they desire to file this bill, not to correct the errors of court, but the errors of counsel.

So, then, it does not appear *that this bit of evidence could not have been produced* at the time of the original hearing, and hence the rule is not complied with. It is simply an attempt to try the case piece-meal. And in the next place, does it appear from the affidavit of Ricker, or of Walker, why, after the final decree, it took four years before this bit of evidence was discovered? No! Does Ricker, or his counsel pretend that they could not have found out this fact, if it be a fact, as to the time when this security was sold to Greenebaum & Foreman, had any effort been made?

No! Then why was it not done? Simply because counsel did not, during these four long years, suppose that it would in the slightest degree change the case; and hence they did not try to find it out. Did not use any diligence whatever. It was only after the Supreme Court affirmed this decree that counsel commenced to get up some other point. And it struck them there might be a point here, and then they went to Walker, and inquired of him, and he told them this fact. Have they shown any diligence? In the language of this court, the "matter must not only be new, "*but it must be such as the party, by the use of reason-* "*able diligence, could not have known.*"

Where is the seasonable diligence? In what respect have they complied with the rule, which enables them to file a bill of review? In no respect. It is simply a desire to raise a new point in the case, which they did not raise in the first instance, and they have the face to ask of this court, its assistance in the premises. Counsel here are astute, and we disclaim any reflection, but if counsel are right in their claim, in order to procure a rehearing of a case after final decree, parties should, in the first instance, employ ignorant attorneys, who would not bring forward their whole case in the first instance, and if beaten, they could have a bill of review, upon the ground that a certain point was overlooked, and have a review and introduce testimony which was as much within their power on the first hearing as on the second. *It is a new discovered defense, not new discovered evidence to support an old defense.*

(*c.*) As to the merits of the position of Ricker's counsel, we claim that it has none; that even if the facts were admitted, as they claim them to be, that no case then is made out in favor of Ricker as against Greenebaum and Foreman, which is the only controversy in this case. For the order of conveyances we refer the court to our brief

under point II. By stipulation appearing in the record, the abstract of title was introduced in evidence by consent of all the parties.

Walker conveyed Block 16 to Kinney by deed dated November the 25th, 1872; filed for record December 2d, 1872.

Walker conveyed to Ricker Block 14 by deed dated February 25th, 1873; filed for record April 5th, 1873.

As between Kinney and Ricker, it is admitted that the property of Ricker should be first sold before the property of Kinney. Now, then, Greenebaum and Foreman claim under Kinney by virtue of a trust deed bearing date the same day as the conveyance to Kinney, securing a note of $12,000.00 for purchase money. While it is true that the affidavits filed show that Greenebaum and Foreman bought the notes so secured in October, 1873, which was after the date of the conveyance to Ricker, yet it was while the title stood in Kinney, and before the re-conveyance by Kinney to Walker, which took place on March the 6th, 1874, that conveyance being a quit-claim deed, and simply passing the equity of redemption to Walker. It must be admitted that the mortgagee, and those claiming under him, are purchasers within the meaning of the recording law.

1 Jones on Mortgages, Sec. 458.

A note secured by a mortgage is personal property, as it goes to the executors or administrators, and not to the heirs of a deceased party. As to the note in this case, it was not due, and although should it be admitted that as between Walker and these parties a defense could be made thereto, still as between the purchasers of a note before maturity, without notice of a defense thereto, they will be protected not only as to the note, but the note will carry with it the mortgage as an incident, and no defense can be

set up as against a mortgage when foreclosed, which can not be set up as against a note.

*Carpenter* v. *Longan*, 16 Wallace, 271.

The rule is different in the courts of the State of Illinois, but the Supreme Court of the United States hold that a mortgage, being an incident, will follow the note into whosesoever hands it may come, and can be enforced, and no other defenses can be set up as against the mortgage than could be as against the note. A person executing a deed of conveyance, gives precisely the same title as he holds, and if he holds the title freed from equities, so a conveyance by him to a third party will pass the same title freed from equities, although the person taking such title should know of the equities existing against the property. Otherwise, an innocent purchaser, taking without notice, would not receive the benefit of such purchase if he could not sell the same to a purchaser who should know at the time of his purchase of the equities existing against the property.

Perry on Trusts, Sec. 830.

Greenebaum and Foreman, on examining the record title when they took the mortgage, would see, so far as the record showed, that Kinney had a complete title as against Ricker, and was entitled to have the Ricker property pay the Powell mortgage before the Kinney property could be subjected. Seeing the title therefore that Kinney had, they had a right to rely upon that title, and any trust deed or any deed of conveyance made by Kinney would pass the title precisely in the same condition as Kinney himself held it.

Kinney is bound in law to pay this note. Having conveyed the equity of redemption back to Walker, subject to this mortgage, he is entitled to have the same satisfied out of the property.

*Niles* v. *Harmon*, 80 Ill., 396.

So that Kinney, having executed his securities for the purchase money, will stand in the same position as if he had paid the entire purchase money; and Greenebaum and Foreman will occupy precisely the same position as if Kinney had made a loan of money subsequent to his purchase of an utter stranger to the title, and such notes had come into the hands of Greenebaum and Foreman. It is a rule, without exception, that a person taking under an instrument is not bound to examine the title subsequent to the date of the record of the instrument under which he claims; and Greenebaum and Foreman, claiming under Kinney, were not bound to examine the title, either to block 16, or any portion of the premises, subsequent to the date of the instrument of conveyance to Kinney. If such were the case, Kinney might be deprived of the sale of his property, although an innocent purchaser of the property for full value.

In the first affidavit of Walker he says, that he took the Kinney security with the intention on his part, of devoting same, *or its proceeds*, to the payment of the Powell mortgage. That he left it with A. C. Reed to negotiate it for him, and obtain the money thereon. And then he says that he borrowed Reed's check, and indirectly admits that he left this Kinney security with Reed as indemnity for the check he had borrowed of him, and other purposes, and that he took the Reed check and sold it to Greenebaum & Foreman, and then the panic coming on, Reed's check was not paid, and Reed turned over or sold this security to Greenebaum & Foreman, in consideration of the return of his check to him, and the payment of $2,500 besides by Greenebaum & Foreman to Reed. It is evident from this affidavit, that Reed held this Kinney security from Walker for a *bona fide* consideration, and that Reed, with Walker's consent, sold the same to Greenebaum & Foreman for the sum of $9,500.

Counsel takes Reed's *ex parte* affidavit on the same day, in which counsel simply has him to state that Walker left the Kinney security with him, but the affidavit omits to state what the consideration of such bailment was. But taken both together, it is simply plain that Reed held this Kinney security for a valuable consideration, and that he, not Walker, sold it to Greenebaum & Foreman, and there is no statement of any kind, that Reed, when he bought it, knew anything of any arrangement by which the Powell mortgage was to be paid off, with the proceeds thereof.

Now, it is evident that Walker got the proceeds of this security either from Reed, or Greenebaum & Foreman, and if he did not pay off the Powell mortgage therewith, according to his original intention or agreement, it cannot be claimed that the purchaser was bound to see to the application of the proceeds.

In Walker's second *ex parte* affidavit, the first not being entirely to the mind of counsel, he undertakes to modify or change the facts somewhat.

In that Walker says, that it was an agreement with Kinney; that this security, or its proceeds, were to go for the purpose of paying off the Powell mortgage, and further, he says that he explained to Greenebaum & Foreman, that he intended to use them for that purpose. It will be seen that Reed drops out in this affidavit as having anything to do with the matter, though it appears in the former that Reed got the consideration and money from Greenebaum & Foreman, for this security. Nor does it appear in that affidavit that he informed Greenebaum and Foreman that he had any agreement with Kinney that he was to use the proceeds of this security for the payment of the Powell mortgage. Nor does it appear anywhere that Reed was ever notified of any agreement with anybody, or any in-

tention on the part of Walker to apply the proceeds of this security for any particular purpose, and hence took them as plain, negotiable paper, before maturity, and had a right to negotiate them to any person, with or without notice of any equity on the part of Kinney. Greenebaum & Foreman bought them from Reed, and not from Walker. At most, the affidavit simply states, that Walker informed Greenebaum & Foreman of his former intention to so use this security toward the payment of the Powell mortgage, but nothing is said in the affidavit whereby it could be inferred that there was any binding agreement with any one to use them for that purpose. Greenebaum & Foreman, in taking under Kinney, had notice by the record of the existence of the Powell mortgage, and the information from Walker to him that he intended to use this security to pay it off, was of no consequence, for it might be he intended to use the very money he got from them or Reed for that purpose.

Moreover, the notes themselves express the agreement between Kinney and Walker, and no verbal understanding could control their negotiability or form any part of the contract. It matters not what Ricker may state in his petition as to what he expects to prove; the authorities are clear that the facts new discovered are to be shown by accompanying affidavits.

We have heretofore argued the effect of the state of facts which they claim the affidavits show. Greenbaum and Foreman took good title to the notes, and with them the security, if they took by the record, and no facts are shown by the affidavits which any way would control the record. Kinney had the right to have his notes paid by the security, as after Greenbaum and Foreman obtained the security he conveyed by quit-claim deed, the equity of redemption back to Walker, subject to this mortgage debt. Our rights were obtained while Kinney owned the

property, and will fall no lower than his rights while he so owned it.

Counsel says, on page 37, that the affidavits show that Kinney, before he took a conveyance of block 16, knew that Coolbaugh and Powers held title to said block, by deed of July 1, 1872, not then recorded, and took his conveyance from Walker upon the agreement of the latter to procure Coolbaugh and Powers' deed, and that Greenebaum and Foreman had notice of that fact.

Now, there is not one word in the affidavits filed with the petition to that effect, and whatever claim petitioner may set up in his petition goes for nothing, for the facts relied on must be shown by affidavits.

On the contrary, the record in this case shows that the deed to Kinney of Block 16 was filed for record prior to the deed to Coolbaugh and Powers, and there is a stipulation in the record that these dates are to control.

Why counsel states that the affidavits show anything of the kind, we are at a loss to determine. Counsel is entirely wide of the mark, when he states the contents of his affidavits, and what Walker said therein, in sub-heads *Third* and *Fourth*, on page 37 of his brief.

Counsel makes some point upon the pleadings, that the issue was not properly made for the purpose of marshaling securities. That question cannot be raised upon bill of review. The only question is this, is the decree wrong, not whether the procedure was regular or irregular?

To sum up our argument, we claim:

1st. *That the appeal should be dismissed because the order refusing leave to file a bill of review was the exercise of discretion and hence not subject to a review.*

2d. *That it should be dismissed because the order in question is not a final order made in any suit. If the motion is not allowed to dismiss, then the order should be affirmed.*

3d. *Because a bill of review will not lie for error apparent after the lapse of two years from date of decree.*

4th. *Because there is no error apparent upon the face of the record.*

5th. *Because on the ground of new discovered evidence no appeal will lie from an order refusing leave to file a bill of review.*

6th. *Because a bill of review will not lie upon the ground of new discovered evidence after the lapse of two years.*

7th. *Because appellant has been guilty of laches in making application for leave.*

8th. *Because no affidavit was filed with the petition showing that the new matter discovered could not have been produced or used on the original hearing.*

9th. *Because it does not appear that the new matter was such as Ricker, by the use of reasonable diligence could not have known of upon the original hearing.*

10th. *The affidavits filed do not show any new evidence which is material, or which could change the result if leave were granted.*

Respectfully submitted.

JULIUS ROSENTHAL,

A. M. PENCE,

*For Appellees, Greenebaum & Foreman.*

CHICAGO, Sept. 24, 1879.

IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1879.

SHERMAN A. RICKER,
*v.*
NATHAN POWELL, ET AL.

IN EQUITY.
No. _____

## ARGUMENT OF EDWARD S. ISHAM,

*For NATHAN POWELL, Appellee,*

AND IN SUPPORT OF MOTION TO DISMISS APPEAL.

BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET, CHICAGO.

1879.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1879.

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SHERMAN A. RICKER
*vs.*
NATHAN POWELL, ET AL. } *In Equity.* No.

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And now comes said defendant, NATHAN POWELL, and moves the Court that the appeal in the above entitled cause be dismissed, for the reason that the record fails to show that the decree below has been performed, or that performance thereof has been excused by order of Court; and for the further reason that no appeal lies in such case as is presented by the record.

NATHAN POWELL,

By EDWD. S. ISHAM, *of Counsel.*



IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1879.

SHERMAN A. RICKER,
*v.*
NATHAN POWELL, ET AL.

IN EQUITY.

No. _____

In this cause there is brought before the court again for review the decree which was at the last term considered in *Orvis* v. *Powell.*

In the court below, the suit was brought by POWELL for foreclosure of a mortgage. The decree was for the *payment of money*, and in default of such payment for sale of the mortgaged land; and it also appointed a certain order of sale of parcels of the land, to protect equities of certain subsequent grantees, not primarily of the mortgagor, but of *his grantee*, SAMUEL J. WALKER, *to whom he had conveyed the whole by a quit-claim deed.* Upon the appeal of ORVIS, the decree was in this respect, at the last term, twice affirmed. Just upon the threshold, however, of the execution of the decree by the Master, RICKER, another defendant, asked leave to file a bill of re-

view, complaining anew of the order of sale established between *him* and his co-defendants. The order was established below, at the instance of defendants there, and is matter to which, in itself, Mr. POWELL is, of course, indifferent.

It is matter of very serious moment to him, however, if his money is to be withheld, and if he is to be refused the enforcement of the decree establishing his rights, about which there has never been any controversy whatever, while defendants whose equities are equally subordinate to his rights litigate interminably between themselves as to their respective responsibilities.

Accordingly he insists upon the rule that before any bill of review or other bill to reverse or alter a decree can be filed, *the decree must be first obeyed and performed.* The rule is explicit; the rare exceptions to it are of very special character, and find no place in this record. There was no error, therefore, in the action of the court below, for the defendant, RICKER, was not entitled to file his bill, and this appeal should be dismissed.

In Daniell's Ch. Pr., Chap. 34, § 5, p. 1582, the rule is thus stated:

"Filing a bill of review does not stay the execution of the decree which is complained of, and before any bill of review or other bill to reverse or alter a decree can be filed, the decree must be first obeyed and performed; except that, if any act is decreed to be done which extinguishes a right at common law, as the making of an assurance or release, acknowledging satisfaction, canceling of bonds, or evidences, and the like; the court may dispense with the actual performance of that part of the decree until such bill is determined. Thus, *if money is directed to be paid, it ought to be paid before the bill of review is filed;* though it may afterwards be ordered to be refunded. * * * Under *very special circumstances*, the performance of the decree may be dispensed with; and where the plaintiff was very poor, he was allowed to file a bill of review without payment of the *costs* of the former suit."

In Story's Eq. Pl., § 406, it is said:

"The decree must be first obeyed and performed before a bill of review can be brought; as if it be for land, the posses-

sion must be given up; *if it be for money, the money must be paid;* if for evidences, the evidences must be brought in; and so in other cases. But if any act be decreed to be done, which extinguishes the parties' right at the common law, as making of assurance or release, acknowledging satisfaction, canceling of bonds, or evidences, and the like, it is declared that those parts of the decree are to be spared until the bill of review be determined. *But such sparing is to be warranted* BY PUBLIC ORDER MADE IN COURT."

The foregoing language is taken substantially from the third and fourth of Lord BACON's ordinances. The expressions employed in the statements of the rule, and by the courts in enforcing it are of the most peremptory sort.

In 12 Mod. Rep., 343, *Anonymous*, the following is the statement:

"It was agreed by the court and the bar that the course of the court is, before any bill of review is granted the former decree ought to be executed, if the *cause of the bill of review* be not *such as extinguishes the whole right and foundation of the decree*, as a release; and that it is *a good plea in bar* of a bill of review, *that the former decree is not executed.*"

In *Williams* v. *Mellish*, 1 Vern., 117, on an application, such as was made in this case below, for an order staying proceedings on the decree till the bill of review should be heard, the Lord Keeper said: "The decree shall be performed to a tittle, "before any bill of review be allowed, unless the plaintiff, Will-"iams, will swear himself not able to perform the decree, and "will surrender himself to the *Fleet*, to lie in prison till the "matter be determined on the bill of review."

In *Liddell* v. *The Bishop of Durham*, 2 Bro. P. C., Tom. Ed., 65, Lord Chancellor COWPER said:

"I think the old orders that have been read are reasonable and just, and ought to be observed to prevent unconscionable delays by bills of review, which would be brought in all causes of consequence and value, if they might be filed without leave of the court and before the decree performed."

In *Partridge* v. *Usborne*, 5 Russ., 241, the rule was enforced, and it was stated in argument by Mr. SUGDEN, and other coun-

sel, and agreed, that for a century and a half, no instance could be found in which the court had dispensed with the rule.

*Wiser* v. *Blachly*, 2 J. Ch., * 491.
*Livingston* v. *Hubbs*, 3 *Ib.*, * 126.
*Griggs* v. *Gear*, 2 Gilm., 17.

In the present case the record shows affirmatively that no recognized ground of exception exists. The defendant, RICKER who seeks to file this bill, is shown to be a man of fortune, who has invested over $80,000 upon the premises he has purchased; and the relief he seeks is *solely against a co-defendant*, and he makes no denial whatever of the rights of POWELL, which constitute the "right and foundation of the decree." 12 Mod., 343.

The performance of the decree by payment of the money to POWELL would neither extinguish nor impair any right of RICKER. He would be subrogated to the position of POWELL under the decree, which would be kept alive and enforced for his protection. This seems to be clearly suggested as to ORVIS in the first opinion of this court in *Orvis* v. *Powell*. And we shall make no objection to any orders of the circuit court, that may be thought necessary to effectuate such subrogation.

It is quite immaterial, therefore, whether RICKER proposes to file his bill of review as matter of right, which he claims, or by leave of court; or, in other words, whether he proposes to file it upon the basis of error apparent in the record, or on that of matter newly discovered by him. In either case it is matter of condition precedent, that the bill of review *must show* that the former decree has been obeyed, and the money paid. And if the bill of review were filed, even by leave of court, the fact that the former decree had *not been performed*, would be a *good plea in bar*. 12 Mod., 343. *Partridge* v. *Usborne*, 5 Russ., 241.

A mere glance at this record will show how great is the *inequity* which has been done, and is still further projected, to Mr. POWELL, under color of protecting fanciful equities of persons who have come into their present situations without any

instrumentality of his. A more significant case in illustration of the value of the rule we insist upon is not to be found in the reports, and can hardly be imagined.

Mr. POWELL filed his bill for the foreclosure of this mortgage in July, 1874.

Without the slightest denial or contest of his right to obtain a decree below for the amount of money he claimed, but upon an issue *between defendants*, except so far as the right of redemption was involved, an appeal was taken in July, 1875.

*Three years and a half later* his decree was substantially affirmed in November, 1878. In March, 1879, in a further wrangle between co-defendants, the mandate of this court was revoked, but the decree was again affirmed in May, 1879.

Thus, five years have gone by, and now it is proposed to go over this thing again. For nothing less is involved in allowing the present appeal. This court cannot make a decree, finally disposing of the cause on this hearing, for the alleged facts upon which the right of review depends, are yet to be established. At present they appear only in certain affidavits filed in support of the application *for leave to file the bill;* and they are disputed and contested by the other defendants; and a long course of litigation will be inevitable, with probable successive appeals to this court in the future, as in the past. It is plain that the only issue presented upon this hearing is that involved in the first and second assignments of error, namely, whether the judicial discretion of the court below was properly exercised in refusing *leave to file* this bill of review. If allowed to be filed and prosecuted, the litigation may be interminable. And we insist that if the ruling below should be reversed, and leave be directed to be given to file this bill, it should be upon a condition that RICKER first perform the decree, and himself assume and carry during his litigation the indebtedness it represents.

It is no answer to say that the security for POWELL's debt is very large. It is not security that he wants any more, but

his payment; and he was entitled to that by his contract more than six years ago, and by the decree more than five years ago. The larger the security under the decree, the less the reason why a defendant, who asks to file a bill of review, and protract litigation with his co-defendants, should object to perform the decree. Still more unsubstantial is Mr. FULLER's suggestion, that interest accumulates at a low rate upon Mr. POWELL's decree. The settled rule and procedure of equity will not require him to content himself longer with that form of compensation for the denial of his uncontested right. He is entitled to be granted now his right. The record shows RICKER to be a man of fortune. For aught that appears, however, this decree represents all that POWELL has in the world. The marrowless computation of interest on a spectral capital will neither pay a man's debts, nor feed his family. It illustrates the wisdom and justice of the rule we invoke, that but for its interposition, a man whose right was undisputed might be broken in fortune, and his family starve, while co-defendants wrangled in litigation over matters wholly immaterial to him, and subordinate to his right.

II.

The rule that where land subject to a mortgage has been subsequently sold in parcels at different times, it shall be subjected to satisfy the mortgage in the inverse order of alienation has undoubtedly been approved and adopted in Illinois. *Iglehart* v. *Crane*, 42 Ill., 261. This court so found, in *Orvis* v. *Powell*. And in that case the court declared that when this rule is adopted by a state it becomes "a rule of property affecting the title to real "estate, and *as such is to be governed in its application in this* "*court*, by the law of the state where the land lies." Now the same case, by which the rule is announced in Illinois, also asserts that no defendant is entitled to the application of the rule against co-defendants, except when he seeks it *upon a cross-bill*,

because it is an affirmative relief to be accorded to him to the injury of his co-defendants. Such is the law of the state, therefore, in which this land lies. The court said: "If the complainants had executed no releases, and the appellants *had sought* "*merely to procure a decree directing the lots last conveyed to be* "*first sold*, it would doubtless have been necessary to file a "cross-bill, making their co-defendants parties, *as they would* "*have been asking a decree to the prejudice of their co-defend-*"*ants.*" *Iglehart* v. *Crane*, *supra*, p. 271. That is precisely the present case. There is no defense proposed here to any right asserted by the original complainant. The only controversy is between defendants; and it is sought merely to compel the land of one to be subjected to sale before that of another. It would not accord with regular chancery procedure to grant such relief, without a cross-bill, or other affirmative pleading, even if the supreme court of the state had been silent upon the subject. Now RICKER has never filed a cross-bill, *asking the aid of this rule*. On the contrary, he did file a cross-bill, which appears in the record, and *did not ask* by it the application of the rule. While making claim for other things he did not claim this, but waived it, at the time when he might properly have asked it. He neglected to lay the foundation of any *right*. It is a matter of mere grace and of good fortune to him, therefore, that any part of block 16 was arranged to be sold before his block 14. It was not error that in the condition of the record more land was not so subjected in advance of his.

A considerable part of Mr. FULLER's brief is devoted to exculpating Mr. RICKER from charge of neglect in not having discovered and complained *earlier*, that by this decree the sale of his land was postponed to that of a part only, and not the whole of block 16. But this is plainly an immaterial issue; for in the condition of the record when the decree was made, he was not entitled of right to have *any* land subjected to sale before his. There was no error in the decree in that it failed to give RICKER an advantage to which he was not entitled, and which

he did not even claim in the cross-bill he actually filed; and that he was given an advantage to which he was not entitled, in first selling a part of block 16, is a benefit to him of which he cannot be heard to complain.

## III.

The interest in a real estate security, created by deed of trust, which belongs to a holder of a promissory note not due, and is transferable by delivery, passing to the holder of the note as an incident to the debt is not a purchase or conveyance of land within the scope of the above rule as to the inverse order of alienation.

In this case the important facts are simply these: WALKER conveyed block 16 to KINNEY by a deed dated November 25th, and recorded December 2d, 1872. At the same time KINNEY executed a deed of trust to JOHN G. ROGERS bearing the same date. It was recorded October 23d, 1873.

That deed of trust secured the payment of a promissory note for $12,000, payable in five years from that 25th of November, 1872.

Now question arises as to the duty of persons purchasing such paper in the market and before maturity, relative to the interest in land created by the deed of trust and attending the note as a security.

RICKER asks to file a bill of review because he has newly discovered, that at a point of time subsequent to his purchase of block 14, WALKER was the holder of this KINNEY note and sold it to a co-defendant to this original bill. He claims that the interest in the ROGERS trust land, which upon the transfer of the note by WALKER to the purchaser passed as an incident to the indebtedness, stands upon the same footing as if WALKER had again become the owner of the land and had then executed a new conveyance as a security for the note. Accordingly he says the purchaser of the note is not entitled in

respect of his security to take, when the rule of inverse order of alienation is applied, the place assigned him by the deed to KINNEY and KINNEY's trust deed to ROGERS, but takes the place that would be given him by a new conveyance to him by WALKER at the time of the transfer of the note. It is assumed that when WALKER became the owner at any time of this negotiable note, he became as to persons subsequently purchasing the note from him the owner and mortgagor anew of the land. He claims, in other words, that a purchaser from WALKER of this note having the four years and a half to run was bound to look at the records, and was charged with notice not only of KINNEY's title and of conveyances of lands embraced in the POWELL mortgage anterior to the deed to KINNEY, but also of all the conveyances of these mortgaged lands subsequent to that deed.

If this is true as matter of law, and if the court will carry so far this process of marshalling in favor of this rule of the inverse order of alienation, the matter Mr. RICKER proposes to prove may be significant. But we submit that no court seems to have ever gone so far.

It is true as stated by Mr. FULLER that in *Olds* v. *Cummins*, 31 Ill, 188, the court held a mortgage of realty not assignable under the statute of Illinois, and that the assignee of a mortgage must find his remedy only in equity. In the hands of an assignee, however, it is subject to such equitable defenses only as the original mortgagor had against it in the hands of the original mortgagee. The assignee is not subject to the latent equities of third persons.

If we correctly remember, nothing in this record earlier than the affidavits of new matter shows that this KINNEY note was originally executed and given to WALKER; nor that it was made for purchase money. For aught that appears it came to WALKER long after its date, and after passing from hand to hand, and was passed on by him to one of these defendants. It is of little consequence, however, whether this was so or whether it was

originally given to him, and was held by him until the assignment of it to the other defendants. The question is whether, in the order of sale under the POWELL mortgage, the place of the holder of this note, having purchased it of WALKER before maturity, is not fixed by the deed to KINNEY, which created the title mortgaged by KINNEY. It is a serious matter if any purchaser of such a note is charged with constructive notice of strange equities to the extent insisted upon here by Mr. RICKER. It is certain that in the application of this rule of order of sale, there are limits of ramification beyond which the court will not go, nor require a purchaser to go with his inquiries. The equity sought to be presented by this bill of review is dependent upon testimony yet to be introduced; and it is plainly shown that the material facts are to be established by the testimony of WALKER testifying to his own duplicity and deceit. They will doubtless be disputed and controverted by the defendants whose interests are to be affected by them. In the first opinion in *Orvis* v. *Powell*, where it was claimed that block 18 should have been first sold, because WALKER, the mortgagor, was still owner of an equitable interest in it, this court spoke with great emphasis and said: "We do not believe that the court was bound to "prosecute an inquiry, through all the ramifications of WALK-"ER's dealing with this lot, dependent solely on conflicting oral "testimony, to ascertain if WALKER had a possible ultimate in-"terest in it." In like manner we do not believe the court in applying this rule will follow out all the transfers of a promissory note or of a series of them. Almost the first consideration that occurs is the situation in which KINNEY, the maker of this note, would be left by this doctrine of RICKER that the purchaser of the note before maturity is not protected in the order of sale by the deeds to KINNEY and to ROGERS. Land thus given as security is presumably worth much more than the debt secured. Suppose that the property mortgaged by KINNEY by the trust deed to secure this note is subsequently conveyed by him subject to the mortgage, and the title thus charged passes through

several persons and subsequent incumbrances are placed on it. In the meantime the KINNEY note passes from WALKER, and from hand to hand through several persons, and back to WALKER, and out again, and comes by assignment to the hands of a holder who knows that it has thus passed through WALKER's hands. Can the various purchasers of other parcels of lands subject to the POWELL mortgage insist that this mortgaged tract, instead of being one of the very last parcels to be sold, shall be the first, and thus destroy the security and the estate of KINNEY's grantees, and leave KINNEY liable on the note? And if an equity exists in favor of KINNEY, or of his grantees, holding his equity of redemption, which the holder of the note can not avail himself of, how is the court to adjust this complicated state of things? And suppose, instead of one note there had been a series of them, as often happens, and they had been assigned at different times, will the court pursue all these assignments, instead of holding the purchasers of the notes protected by KINNEY's original title? An extended examination into remote conveyances and far off equities which the court will not pursue, it will not require the purchaser of a note like this to pursue at the peril of his trust security. It was declared by the supreme court of New Hampshire, *Brown* v. *Simons*, 44 N. H., 481, that this order of sale "is *a mere equity*, not a lien or an incumbrance that comes within the provisions of the registry "laws." *Ellison* v. *Pearce*, 29 Barb., 333. The court, in the application of the rule, will not, to protect *a mere equity* on one side, run it out to such lengths and penetrate into such details, as will work a great *inequity* to any one on the other side.

These are matters to be more fully discussed by counsel for the defendants against whom the proposed bill of review is aimed. If RICKER performs the original decree, and pays the money and costs there decreed to be paid, then POWELL has no further interest in the controversy. Except, however, as that decree is performed, the bill of review is destructive of his adjudged

and undisputed rights, and he insists that this appeal should be dismissed.

In any event we think such order should be made as will protect Mr. POWELL against any liability for costs on this appeal. The controversy proposed by RICKER is altogether with his co-defendants, and the provisions of the decree complained of were introduced at the instance and for the benefit of defendants as between themselves, and were matters to which POWELL was necessarily wholly indifferent.

Edwd S Johnson
of Counsel,